Supreme Court, U.S.
FILED

95 1065 DEC 27 1995

OFFICE OF THE CLERK

No. 95 -

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS

Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK,
ET AL.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thomas Patrick Monaghan
Keith A. Fornier
AMERICAN CENTER FOR LAW
AND JUSTICE – NEW HOPE
6375 New Hope Road
New Hope, KY 40052

John F. Sweeney
Gabriel P. Kralik
MORGAN & FINNEGAN
345 Park Avenue
New York, New York 10154
(212) 758-4800

Vincent P. McCarthy
(Counsel of record)
Joseph P. Secola
McCARTHY & SECOLA
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923

264 pp

No. 95 -

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS

Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK,
ET AL.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thomas Patrick Monaghan
Keith A. Fornier
AMERICAN CENTER FOR LAW
AND JUSTICE – NEW HOPE
6375 New Hope Road
New Hope, KY 40052

John F. Sweeney
Gabriel P. Kralik
MORGAN & FINNEGAN
345 Park Avenue
New York, New York 10154
(212) 758-4800

Vincent P. McCarthy
(Counsel of record)
Joseph P. Secola
McCARTHY & SECOLA
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923

QUESTIONS PRESENTED

1. In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), this Court replaced the "reasonable time, place and manner" analysis to be applied to injunctions with the more rigorous standard of "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) this Court required "precision of regulation" with regard to injunctive relief which burdens speech, protecting and separating peaceful speech from unprotected non-speech activities. Against this background the first question asked is:

   > Whether the en banc decision of the Second Circuit Court of Appeals upholding a provision of an injunction which prohibits all speech within overlapping fifteen foot floating no-speech zones (which create a fifteen foot no-speech bubble around the abortion clinic and all pedestrians and vehicles) on public sidewalks and streets outside abortion clinics is the most precise way to ensure access to the abortion clinic and promote public health and safety in the context of overwhelmingly peaceful demonstrations and a lack of any finding that a less restrictive injunction could not accomplish the same goals.

2. Again, in the context of the *Madsen* and *Claiborne* decisions above, and particularly the finding in *Madsen* of the unconstitutionality of no-approach zones as content based restrictions on free speech:

   > Whether the Second Circuit's en banc decision upholding the "cease and desist" provision in the

injunction below, based as it is on the dislike by a communicatee of the words being spoken by a communicator, is in conflict with this Court's decision in *Madsen* which held that the no-approach zone burdened more speech than necessary and further rejected content based restrictions on speech as a violation of the First Amendment to the United States Constitution.

PARTIES

The Petitioners are as follows: Reverend Paul Schenck and Dwight Saunders.

The Petitioners were defendants in the District Court and appellants in the Court of Appeals. Reverend Paul Schenck and Dwight Saunders were the only appellants at the Court of Appeals.

The Respondents are as follows: Pro-Choice Network of Western New York, Buffalo GYN Women Services, Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D. The Respondents were each plaintiffs in the District Court and appellees in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

DECISIONS BELOW 1

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

A. Course of Proceedings and Statement of Facts 9

REASONS FOR GRANTING THE WRIT 10

I. The Decisions By The District Court And En Banc Court Of Appeals For The Second Circuit Conflict With All Existing First Amendment Constitutional Jurisprudence Regarding The Rights Of Speech On Public Sidewalks And Streets Throughout The United States And Can Only Be Justified If The Right To An Abortion Trumps The Right Of Peaceful Speech Under The First Amendment To The U.S. Constitution 10

A. The Free Floating, Unlimited, Overlapping, Moving No Speech Zones In The Context Of Non-Violent, Peaceful Speech, Burden More Speech Than Necessary To Serve The Governmental Interests In This Case 15

B. In Order To Satisfy The Requirement In *Madsen* And *Claiborne Hardware*, For Precision Of Regulation, The Lower Court Must Find That Unprotected Behavior So Colors The Entire Collective Effort That The Offending Aspects Of A Demonstration Cannot Be Separately And Less Intrusively Controlled By Any Other Means Than Eliminating All Peaceful Forms Of Protest 19

II. The Cease-And-Desist Provision Of The Injunction Entered By The Lower Court And Upheld By En Banc Panel Of The Second Circuit Court Of Appeals In This Case Is Clearly Content Based And Punishes Peaceful Speech In Conflict With This Court's Decision In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994) Which Struck Down A Similar No-Approach Zone 21

A. The Cease-And-Desist Provision Was Unnecessary To Achieve The Government Interests In Access To Clinics And In Public Safety 21

1. The Injunction Is Content-Based To The Extent It Is Justified To Protect Respondents' Customers From Unwanted Speech . 25

TABLE OF CONTENTS (cont'd)

APPENDICES

APPENDIX A: September 28, 1995 opinion at the En Banc Panel of the U.S. Court of Appeals for the Second Circuit, *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d Cir. 1995)

- Judge Oakes' Majority Opinion A-1
- Preliminary Injunction A-33
- Judge Winters' Majority Opinion A-37
- Judge Jacobs' Concurring Opinion A-46
- Judge Meskill's Dissenting Opinion A-48
- Judge Altimari's Dissenting Opinion A-72

APPENDIX B: September 6, 1994 Panel Opinion of U.S. Court of Appeals for the Second Circuit, *Pro-Choice Network of Western New York v. Project Rescue of Western New York*, 67 F.3d 359 (2d Cir. 1994)

- Judge Meskill's Majority Opinion A-79
- Judge Oakes Dissenting Opinion A-109

APPENDIX C: May 26, 1993, Panel Opinion of the U.S. Court of Appeals for the Second Circuit, *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) A-116

APPENDIX D: March 5, 1991, Defendants' Stipulation in the District Court A-134

APPENDIX E: February 14, 1992, Opinion of the U.S. District Court, *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992) A-138

APPENDIX F: November 28, 1995, Order to Show Cause for Contempt in the U.S. District Court A-187

TABLE OF AUTHORITIES

Page(s)

CASES

Beuharnais v. Illinois,
343 U.S. 250, 285 72 S.Ct. 725, 745
96 L.Ed. 919 (1952) 7

Boos v. Barry,
485 U.S. 312, 321, 322 (1988) 23, 28

Bray v. Alexandria Women's Health Clinic,
113 S.Ct. 753 (1993) 14

Carroll v. President of Princess Anne,
393 U.S. 175, 183-84 (1968) 16

City of Houston v. Hill,
482 U.S. 451, 462 n.11 (1987) 8

Dorman v. Satti,
862 F.2d 432, 437 (2d Cir. 1988) 20, 25

Forsyth County, Georgia v. Nationalist Movement,
112 S.Ct. 2395, 2403 (1992) 25

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46, 55, 56 (1988) 23, 27, 28

Loper v. New York City Police Dep't,
999 F.2d 699 (2d Cir. 1993) 20

Lovell v. Griffin,
303 U.S. 444 (1938) 20

Madsen v. Women's Health Center,
___ U.S. ___, 114 S.Ct. 2516,
129 L.Ed.2d 593(1994) . . . . . 4, *passim*

Members of City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789, 810 (1984) 20

NAACP v. Clairborne Hardware,
458 U.S. 886 (1982) . . . . . 9, *passim*

New York Times Co. v. United States,
403 U.S. 713 (1971) (per curiam) 16

New York NOW v. Terry,
886 F.2d 1339, 1363 (2d Cir. 1989),
cert. denied, 495 U.S. 947 (1990) 20

Oliveri v. Ward,
801 F.2d 602, 606 (2d Cir. 1986),
cert. denied, 480 U.S. 917 (1987) 20

R.A.V. v. City of St. Paul,
112 S.Ct. 2538, 2542 (1992) 25

Rhenton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 28

Texas v. Johnson,
491 U.S. 397, 407 n.4, 411-12 (1989) 27, 28

Thornhill v. Alabama,
310 U.S. 88 (1940) 20

United Mine Workers of America v. Bagwell,
114 S.Ct. 2552, 2563 (1994) 17

United States v. Eichman,
496 U.S. 310, 317-18 (1990) 8, 27

United States v. Grace,
461 U.S. 171, 177 (1983) 20

Ward v. Rock Against Racism,
491 U.S. 781, 791, 797, 799 (1989) 15, 17

CONSTITUTION AND STATUTES

U.S. Const. Amend. I . . . . . 3, *passim*

28 U.S.C. § 1254(1) 3

MISCELLANEOUS

Lewis Carroll, *Alice Through the Looking Glass* (1872) . . . 7

No. 95 -

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS,

Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK,
ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

By summons and complaint, the Respondents commenced an action in federal district court on September 24, 1990 seeking declaratory injunctive relief against planned social protest demonstrations at abortion clinics in the Buffalo area. By decision and order dated February 14, 1992 the district court issued a preliminary injunction which operated as a blanket ban on all speech on public sidewalks and streets, even peaceful non-threatening speech. That decision is published as *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992) (Appendix E, pages

A-138 through A-186). An appeal was taken by Petitioners. On September 6, 1994 a panel of the Court of Appeals upheld all parts of the injunction ensuring access to the abortion clinic, but struck down two provisions of the injunction as violative of the free speech clause of the First Amendment, *inter alia*, a provision which established fifteen (15) foot "floating no-speech bubble zones" around the abortion clinic itself and each pedestrian and vehicle entering or leaving the abortion clinic and a second provision requiring protesters to cease and desist from unwanted speech at the sole discretion of the individual entering or leaving the abortion clinic. That decision is published as *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 67 F.3d 359 (2d. Cir. 1994). (hereafter "*Pro-Choice Original Panel*") (Appendix B, pages A-79 through A-115).

Respondents petitioned the Court of Appeals for a rehearing en banc, which was granted on December 27, 1994. On September 28, 1995, the en banc panel of the U.S. Court of Appeals for the Second Circuit reversed the earlier panel, finding that the blanket ban on speech on public sidewalks and streets was consistent with the First Amendment. That decision is published as *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d. Cir. 1995) (hereinafter "*Pro-Choice En Banc Panel*") (Appendix A, pages A-1 through A-78).

Following contempt proceedings in the district court, an appeal was taken. On May 26, 1993, a panel of the United States Court of Appeals for the Second Circuit issued an opinion which, although not reaching the merits, analyzed the contempts in the context of the floating bubble zones and the cease and desist provisions of the preliminary injunction. That decision is published at *Pro-Choice of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) (Appendix C, pages A-116 to A-133).

JURISDICTION

The preliminary injunction of the United States District Court for the Western District of New York was entered February 14, 1992. The original panel decision of the United States Court of Appeals for the Second Circuit was decided on September 6, 1994. The Court of Appeals granted in banc consideration of two provisions of the injunction (which the original panel had struck down as violative of the First Amendment) on December 27, 1994. The en banc panel of the Court of Appeals issued its decision on September 28, 1995, reversing the earlier panel decision. This Court has jurisdiction, under 28 U.S.C. Section 1254(l) to review the judgment of the United States Court of Appeals sitting in banc.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution Amendment I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ".

STATEMENT OF THE CASE

In this case the en banc panel of the Second Circuit has upheld a temporary injunction which (*inter alia*) forbids peaceful picketing, leafletting, and conversation by Petitioners on public sidewalks and rights of way.

Both dissenting opinions from the en banc decision state that the very foundation of the First Amendment, the public forum doctrine, is severely damaged by the en banc decision.

Judge Meskill states:

> Today thirteen of this court's judges give approval to an injunction which seriously infringes on the constitutional rights of freedom of speech and expression. . . .
>
> A careful examination of the entire record in this case should lead to one conclusion: the inclusion of both the buffer zone and the cease and desist provisions in the injunction fails the analysis enunciated in *Madsen v. Women's Health Center*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Indeed, as I read the record, what was done by appellants--the picketing, the leafletting, the voicing of protest--was done in the finest tradition of the First Amendment, hardly justifying so sweeping an abridgment of free speech. Regrettably, the majority today concludes otherwise, *embarking this Court on an ill-fated journey whose destination is the dilution of the public forum doctrine, the very core of the First Amendment*. To such a result I cannot agree.

Pro-Choice En Banc Panel, 677 F.3d at 399 (A-48 to A-49) (Meskill, J., dissenting) (emphasis added).

Judge Altimari states:

> I am saddened by our holding today. Because I believe that the majority of the Court has departed from a proud tradition of zealously protecting the most fundamental of the freedoms bequeathed to us by our forefathers--the right to speak freely, on a sidewalk or street corner--I respectfully dissent. . . . Despite the preferred status that has been conferred upon pure speech

> as exercised in traditional public fora, both majorities today disregard their solemn duties to jealously guard that speech. . . . *I remain persuaded, however, that the protesters tread only upon the sidewalks and streets--a protected setting for the free exercise of persuasive speech--and not upon the constitutional rights of those individuals seeking access to the clinics. . . . In this case, the restrained speech occurred on streets and sidewalks outside health facilities. Yet the Court today chooses to disregard the very foundation upon which our First Amendment freedoms are built.* It is axiomatic that all public streets are held in the public trust and are properly considered traditional public fora.

Pro-Choice En Banc Panel, 67 F.3d at 409-410 (A-72 to A-75). (Altimari, J., dissenting) (emphasis added) (quotations and citations ommitted).

This, in short, is a free speech case.

This is *not* a "rescue" case. There were no pro-life sit-ins or blockades at the plaintiff abortion facilities before the preliminary injunction issued. The district court stated at the outset of its opinion:

> Prior to the preliminary injunction hearing, defendants stipulated that the physical "blockade" type of "rescue" demonstration may be enjoined. Thus, the evidence adduced at the preliminary injunction hearing centered on constructive "blockade" type of demonstration and "sidewalk counseling". Commendably, there have been no physical "blockades" since

> the Court issued the TRO.

799 F. Supp. at 1424 n.5 (Appendix E at A-146).

The principal question in this case is whether the en banc panel erred by suspending the Petitioners' right to engage in speech -- even completely peaceful speech -- on public sidewalks, alleys, and streets.

As a matter of evidence and constitutional law, the answer is clear: the two disputed provisions of the temporary injunction in this case cannot stand. The injunction unconstitutionally restricts and discriminates against Petitioners' free speech rights.

The extreme nature of the distortion to settled First Amendment jurisprudence by the en banc panel was aptly described by Judge Altimari:

> The "floating bubble zone" established by the district court, and now reaffirmed by the court, is an *unprecedented and unwarranted incursion of freedom of speech*. . . . To my mind, it cannot be said that a prohibition on signs within fifteen feet of an unwilling listener "burden[s] no more speech than necessary." Nor, I think, can it be said that vesting unwilling listeners--even those "en route to a destination,"--with the absolute power to banish speech to a distance of fifteen feet from a moving target burdens no more speech than necessary. The Court's ability to construe these provisions such that they pass constitutional muster puts me in mind of Lewis Carroll's classic passage:
>
> "When I use a word," Humpty

> Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master--that's all."

Alice Through the Looking Glass, Lewis Carroll (1872).

* * *

> The new majorities, however, have sacrificed not only our proper role--to remand a concededly flawed injunction for correction by the district court--but also, in the bargain, the "preferred position" of the First Amendment, see *Beuharnais v. Illinois*, 343 U.S. 250, 285, 72 S.Ct. 725, 745, 96 L.Ed. 919 (1952) (Black, J., dissenting). The question now is "which is to be master--that's all." . . . Like Alice, I am befuddled by the whimsy effected today. I dissent.

Pro-Choice En Banc Panel, 67 F.3d at 410-411 (A-73, A-76 to A-77 (Altimari, J., dissenting) (emphasis added).

This Court should grant this petition for certiorari and correct this manifest attack on the core of the First Amendment: the protection of unpopular and despised speech in the traditional public forum of public sidewalks and streets.

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451,

462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

The most important reason to grant this petition is to restrain the manifestly improper and expansive view of "public health and safety" which ambiates the *Pro-Choice En Banc Panel's* rationale. Without correction by this Court, this overly broad police power will metastasize to banish all unpopular speech and expression from our public sidewalks and streets, which challenge us as a society to change.

Judge Winters' majority opinion[1] states as follows:

> Generally, targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to the protests. . . . Moreover, the power of televised pictures of coercive or obstructionist conduct to chill others is considerable and an independent reason motivating some protestors to go beyond peaceful persuasion. . . . *Moreover, an extensive record of coercion or obstruction is not required to justify an injunction requiring physical separation and an end to such conduct. The power of even isolated threats or obstructions to exert a chilling effect*

---

[1] Although Judge Oakes' opinion is labeled the majority, Judge Winter's opinion also garnered a majority of the en banc panel.

> *on some members of society need not be ignored.* The timid have a right to go about their business, and it is *no embarrassment* for a federal court to say so.

Pro-Choice En Banc Panel 67 F.3d at 96 (A-41 - A-42) (Winters, J., concurring) (emphasis added).

The Winters Majority has enthusiastically rejected the settled First Amendment jurisprudence of this Court reflected in cases such as *NAACP v. Clairborne Hardware*, 458 U.S. 886 (1982). If the Winters Majority is correct, then their new constitutional right "not to be hassled in public" will swiftly encroach upon union picketlines, gay rights activists and all other anti-establishment protesters who "hassle" the American people by challenging the status quo. "Don't rock the boat" will be the new core of the First Amendment.

A. Course of Proceedings and Statement of Facts

By summons and complaint, the plaintiffs commenced an action in federal district court on September 24, 1990 seeking declaratory injunctive relief against planned social protest demonstrations at abortion clinics in the Buffalo area. The district court issued temporary restraining orders and later had extensive preliminary injunction hearings.

At the beginning of the preliminary injunction hearing, the defendants filed "Defendants' Stipulations." (Appendix D: A-134 to A-137). The defendants' stipulations made it clear for purposes of the preliminary injunction that the defendants would stipulate to a preliminary injunction against blockades and mass trespass. However, the plaintiffs proceeded to request and the district court granted an injunction prohibiting a broad variety of free speech activities of the defendants including what is commonly known as sidewalk counseling, picketing,

demonstrating and an affirmative order compelling the defendants to discourage others from engaging in any of the enjoined activities.

This appeal does involve two aspects of the preliminary injunction that seek to enjoin pure speech activities (1) such as setting up fifteen (15) foot floating bubble zones around the abortion clinic and all pedestrians and vehicles to be free to demonstrations; and (2) such as allowing sidewalk counseling by only two individuals but if the person they are attempting to speak to declines to speak them, then they must immediately move back fifteen (15) feet and immediately stop any expressive activities.

REASONS FOR GRANTING THE WRIT

I. The Decisions By ThE District Court And En Banc Court Of Appeals For The Second Circuit Conflict With All Existing First Amendment Constitutional Jurisprudence Regarding The Rights Of Speech On Public Sidewalks And Streets Throughout The United States And Can Only Be Justified If The Right To An Abortion Trumps The Right Of Peaceful Speech Under The First Amendment To The U.S. Constitution

This petition for a writ of certiorari presents significant and compelling constitutional issues. Never before in the history of American jurisprudence has a federal court upheld an injunction prohibiting peaceful, non-threatening speech on a public sidewalk outside a business facility *in absence of a showing that access to the facility is impeded*. While *Madsen, infra*, permitted the imposition of an injunction which created a thirty-six foot buffer zone around the entrance door to abortion facilities, the *Pro-Choice En Banc Panel* upheld an injunction

placing no-speech zones around not just the entrance to an abortion clinic, but also around any person or vehicle seeking access to or leaving such facilities. *These floating no-speech zones are unprecedented in American Constitutional jurisprudence*. They prohibit even the silent holding of a placard within fifteen feet of persons or vehicles "seeking access to or leaving such facilities."[2] The record in this case even notes that

---

[2] The misuse of the floating no-speech zone and the content-based cease-and-desist provisions dampen regular demonstration speech activities. This was illustrated in their first post en banc decision application. On November 28, 1995, the Honorable Richard Arcara, United States District Judge for the Western District of New York, signed an order to show cause to enforce these provisions of the February 14, 1992 injunction against two female Pro-Life advocates. The order relied solely upon affidavits of persons employed by the Womenservices abortion clinic of Buffalo and the clinic's attorney. These employee-affiants identified and described the conduct of the two alleged contemnors, Phyllis Walker and Eva Boldt, both "regular demonstrators" at the clinic. The court's order directed these two women to appear and to answer criminal contempt charges and fines of $20,000 each.

Each percipient witness affidavit submitted requires examination:

1. Lawrence E. Payne, M.D., a physician at the clinic, complained that Ms. Boldt "held a large sign approximately one foot in front and across [his] driver side window" as his car was stopped in the process of exiting the clinic driveway. Dr. Payne opened his "driver side door, stepped out and told Boldt 'Get away -- someone's going to get killed.'" He then returned to his car and left, "safely turn[ing] onto Main Street."
2. Melinda DuBois, a counseling supervisor at the clinic, was interrupted in her conversation as she attempted to speak with a security guard in the doorway alcove of the clinic. Ms. Boldt's and Ms. Walker's shouting of slogans outside the entrance "made it difficult to communicate" with the guard.

(continued...)

---

[2](...continued)

3. Richard Walkner, the security guard speaking to Ms. DuBois above, noted that Ms. Boldt and Ms. Walker shouted their slogans even though Ms. DuBois did not "indicate any willingness to communicate" with them. Mr. Walkner also recounted an incident where Ms. Boldt and Ms. Walker had approached and followed alongside a young woman and her male escort as they were walking toward the entranceway of the clinic. He observed, from a distance, how Mrs. Boldt's and Ms. Walker's shouting of slogans was met by the male escort's own shouting of obscenities back in their direction.
4. Anna Thibodeau, a clinic employee, threatened Ms. Boldt with harassment prosecution for "speaking" to her twice as she left the clinic. Ms. Boldt's attempted communications occurred during Ms. Thibodeau's walk to her car.
5. Marilynn Buckham, executive director at the clinic, complained of an incident when Ms. Walker "was standing in the apron of the driveway" and "shouting." Ms. Walker's presence caused Ms. Buckham to stop and then to proceed into the drive at a reduced rate of speed. According to Ms. Buckham, Ms. Boldt, standing further up the driveway, was then able to "touch" the slowly moving vehicle and to scream into the front seat from the passenger side of the car. In another incident, Ms. Buckham said that Ms. Boldt and Ms. Walker had "lean[ed] into the vestibule area from outside the clinic, shouting for more than one minute." This incident occurred shortly after two young girls who had entered the building were "well within the building and not any longer within sight of persons standing outside."

(*See generally*, APPENDIX F: A-187 to A-220).

Despite what appear to be minor inconveniences caused by typical speech and protest activities, i.e., shouting slogans and holding placards, Ms. Boldt and Ms. Walker, acting alone, are blamed by several of the affiants for consequences out of proportion to their behavior. Examples are: Dr. Payne, who blamed the momentary holding of a placard for making him late to surgery at a

(continued...)

one person was held in contempt for violating this injunction many blocks away from the clinic.

While *Madsen*, held unconstitutional a provision in an injunction that required defendants within three hundred feet of an abortion clinic to "refrain from physically approaching any person seeking services of the clinic (unless such person indicates a desire to communicate)" 114 S.Ct. at 2529, the *Pro-Choice En Banc Panel*, upheld a provision of an injunction prohibiting speech to any individual or group of persons who do not want to be spoken to. In *Madsen*, this Court ruled illegal the prohibition of speech based upon its adverse emotional impact on a communicatee. The *Pro-Choice En Banc Panel* upheld an injunction prohibiting speech based upon the adverse emotional impact upon a communicatee.

In *Madsen*, this Court required precision of regulation by federal courts in issuing injunctions which burden speech, requiring a showing that less restrictive means of censorship either had failed to work in the past or were impracticable. In *Pro-Choice*, there was no prior injunction which attempted to serve the governmental purposes asserted by the lower court

---

[2](...continued)

city hospital in Buffalo; Ms. DuBois, who claimed that her difficulty in communicating to the security guard, caused by shouts outside, "delayed the performance of [her] duties"; and Ms. Buckham, who faulted the presence of one person "standing" in the apron area of the clinic drive for exposing the right flank of her car to traffic as she turned off from the street. More importantly, the District Court's reaction, to censure these typical speech and protest activities and to call Ms. Boldt and Ms. Walker to answer criminal charges, appears to have encouraged this over-reaction. It is interesting here that the "communicatees'" expressed responses, even though threatening, hostile and intimidating, are effectively immunized from injunctive review. The end-result is that clinic employees may speak freely while the First Amendment protection of the Pro-Life message is abrogated.

which was less restrictive of speech. Instead of first issuing a narrow injunction like that in *Madsen*, the lower court immediately went into its draconian prohibition mode of setting up floating no-speech zones, and prohibiting speech to any communicatee who expressed her desire not to receive such speech. See *Pro-Choice*, 799 F. Supp. 1417 (W.D.N.Y. 1992) (Appendix E at A-138 to A-186).

In short, the *Pro-Choice En Banc Panel* flatly and arrogantly in its haste to jump aboard the abortion bandwagon, flouts all constitutional precedent. In order to arrive at its result, the majority opinion misstates much of the record, *see* 67 F.3d at 400 (2d Cir. 1994) (A-49) (Meskill, J., dissenting), and like Humpty Dumpty seeks to make its distortion of law and fact reality. *See* 67 F.3d at 410-411 (A-77 to A-78) (Altimari, J., dissenting).

If this decision is allowed to stand, then no protest on a public sidewalk or street is any longer protected by the First Amendment of the Federal Constitution. We will have stepped back over two hundred years in the development of civil rights, and arguably reverted to a standard of law that predated the Magna Carta. It should be noted that the Magna Carta did permit dissent and protest. Under the *Pro-Choice En Banc Panel's* decision, we revert to a time when sheer brutal power ruled. President John F. Kennedy once noted that those who would make protest impossible make violence inevitable.

Finally, this Court has previously observed in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993) that this nation is divided on the issue of abortion: that people of good faith argue both sides of this debate. By shutting off one side of this debate, the *Pro-Choice En Banc Panel* says to a large group of Americans that their voice does not count. The *Pro-Choice En Banc Panel* decision is so at odds with this Court's prior decisions, especially *NAACP v. Claiborne Hardware*, 458

U.S. 886 (1982), where extremely violent activity was mixed with pure speech and this Court held that precision of regulation meant that while proscribing the violent activities, this Court would protect the nonviolent speech. Pro-Life advocates can only be left with the distinct impression that there are two laws in this country. One that applies to Pro-Life speech and the other that applies to citizens expressing any other ideas. This dichotomy has never before been condoned by this Court and Petitioners pray that this Court does not begin with this case.

A. The Free Floating, Unlimited, Overlapping, Moving No-Speech Zones In The Context Of Non-Violent, Peaceful Speech, Burden More Speech Than Necessary To Serve The Governmental Interests In This Case

As this Court recently noted in the *Madsen*, supra, decision, injunctive restrictions on speech must be narrowly tailored to burden no more speech than necessary. Time, place, and manner restrictions pass scrutiny under the First Amendment only when they are "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), this Court held that the "standard time, place, and manner analysis is not sufficiently rigorous" for evaluating injunctive restrictions on speech, *id.* at 2525 (emphasis added), and that a speech-restrictive injunction is unconstitutional unless the restrictions "burden no more speech than *necessary* to serve a significant government interest," *id.* at 2525 (emphasis added). The *Madsen* Court explained, *id.* at 2526, that this test is equivalent to the test set forth in the earlier case of *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968). In *Carroll*,

this Court elaborated upon the governing constitutional standard:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpoint objective permitted by constitutional mandate and the essential needs of public order . . . in other words, the order must be tailored as precisely as possible to the exact needs of the case.

393 U.S. at 183-84. *See Madsen*, 114 S.Ct. at 2526.[6] Applying the *Madsen/Carroll* content-neutral injunction test in the context of the record below, the *Pro-Choice Original Panel* struck down both the bubble zone and the cease and desist provision "because they burden more speech than necessary" to accomplish the government's "pin-pointed" objective of providing access to abortion facilities.

The validity of legislative time, place, and manner regulations is not dependant on the particular facts of a case, so long as the regulations are neutrally and generally applied. This standard allows the government wider latitude in proscribing activity targeted by the legislature. Injunctions regulating speech, on the other hand, are neither neutral nor generally applicable. Hence, they are constitutionally required to be fact sensitive, to "burden no more speech than necessary to serve a significant interest." *Madsen*, 114 S.Ct. at 2525.

Injunctions affecting speech warrant more rigorous

---

[6] An injunction which is content-based, of course, would be a prior restraint subject to the strictest scrutiny. *Id.* at 2524 n.2. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). To the extent the injunction is justified on the grounds that Petitioners' communication of its message causes anxiety and stress, the injunction would be content-based.

scrutiny than legislative enactments because they are ready tools of censorship. *See Madsen*, 114 S.Ct. at 2524. Because they are issued by a single judge, often carry heavy penalties for their violation, and target particular individuals or groups, "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do generally applicable ordinances." *Id.* at 2524; *cf. United Mine Workers of America v. Bagwell*, 114 S.Ct. 2552, 2563 (1994) ("[w]here a single judge, rather than a legislature, declares a particular sanction . . . such deference is less appropriate") (citing *Madsen* 114 S.Ct. 2516). The *Pro-Choice Original Panel* elucidated this Court's reasons for subjecting injunctions burdening speech to more exacting scrutiny:

> More searching scrutiny of content neutral injunctions restricting expression, as opposed to content neutral legislation restricting expression, is appropriate because of the "greater risks of censorship and discriminatory application" associated with injunctions and the "effective practical guaranty against arbitrary and unreasonable government" inherent in legislation that is to be generally applied.

Pro-Choice Original Panel, 67 F.3d at 369 (A-98) (quoting *Madsen*, 114 S.Ct. at 2524) (additional quotation and citation omitted).

Narrowly tailored, as used in the time, place and manner context, merely means, "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. In other words, the time, place, and manner test allows for a regulation incidentally restricting speech; such a regulation is valid so long as it is more effective in achieving the government interests at stake. But "[t]he less-restrictive alternative analysis

has never been part of the inquiry into the validity of a time, place, and manner regulation." *Ward*, at 797. By contrast, injunctive restrictions on speech must be couched in narrower terms, burdening "no more speech than necessary" to serve a significant government interest. Thus, courts are not free to burden speech by injunction if an effective, less restrictive method is available.

The district court's restrictions were not fashioned with an eye towards burdening no more speech than necessary; rather, the court crafted the terms with a view to satisfying the more lenient "time, place, and manner" test fit for generally applicable legislative restrictions. The content-neutral injunction test announced in *Madsen* requires more.

The district court's application of the wrong standard partially explains why it failed to tailor its injunction narrowly, in accordance with the factual record, to burden no more speech than necessary. The district court lost sight of the constitutional limitations on the use of speech-restrictive means when fashioning its injunction. Although the court identified significant government interests to be achieved, the court did not engage in the required narrow tailoring. Had the court been sensitive to burdening no more speech than necessary, it would have concluded, as did the *Pro-Choice Original Panel*, that the other provisions of the injunction adequately served the "general goal of ensuring access to abortion facilities" without prohibiting otherwise peaceful speech in a public forum. *Pro-Choice Original Panel*, 67 F.3d at 371 (A-101).

The "floating bubble zone" was not necessary to achieve the goal of ensuring access to the abortion facilities at issue; it burdened more speech than necessary. The *Pro-Choice Original Panel*, therefore, properly struck down this provision. Because the cease and desist provision forbids all speech, and not just fighting words and physical threats, it too "burdens more speech

than necessary to prevent intimidation and ensure access to the clinic." *Madsen*, 114 S.Ct. at 2529.[7] To the extent the cease and desist provision serves to protect abortion patrons from stress and anxiety caused by Petitioners' speech, the provision is content-based. In addition, the phrase "in such event" as used in the cease and desist provision is void for vagueness. The *Pro-Choice Original Panel* therefore correctly struck down the cease and desist provision as well.

B. In Order To Satisfy The Requirement In *Madsen* And *Claiborne Hardware*, For Precision Of Regulation, The Lower Court Must Find That Unprotected Behavior So Colors The Entire Collective Effort That The Offending Aspects Of A Demonstration Cannot Be Separately And Less Intrusively Controlled By Any Other Means Than Eliminating All Peaceful Forms Of Protest

This petition concerns two injunctive restrictions. First, the injunction creates floating speech-free bubble zones of 15 feet in radium around any entranceways of, and any individuals and vehicles coming to, or leaving abortion facilities. Paragraph 1(b). Second, the injunction gives any person or group of persons the right to veto Pro-Life sidewalk counseling: the injunction orders Petitioners to "cease and desist" from counseling *at all*, and to cease "demonstrating" within 15 feet of a person or group, whenever that person or group "wants to not have counseling, wants to leave, or walk away." Paragraph 1(c).

---

[7] Absent evidence that the protestors' speech is independently prescribable (i.e. 'fighting words' or 'threats'), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." *Madsen*, 114 S.Ct. at 2529 (internal citation omitted).

These restrictions plainly curtail core free speech in a traditional public forum. Streets and sidewalks are quintessential traditional public fora. *United States v. Grace*, 461 U.S. 171, 177 (1983). Verbal communication and leafletting (the components of sidewalk counseling), as well as picketing, are classic forms of free speech. *Grace*, 461 U.S. at 176-77; *Lovell v. Griffin*, 303 U.S. 444 (1938).

Accordingly, Petitioners "presence on the [side] walk is assured as an exercise of [their] constitutional rights." *Oliveri v. Ward*, 801 F.2d 602, 606 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), (upholding right of homosexual activists to demonstrate in front of St. Patrick's Cathedral). When present, Petitioners "carr[y] with them there as elsewhere the constitutional right to express [their] views in an orderly fashion." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (internal quotation marks and citation omitted). Petitioners "are entitled to express their view on [abortion], particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted." *New York NOW v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). *See also Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993) (overturning restriction on begging on city streets).

If the First Amendment protects begging, *Loper*, critical picketing, *Thornhill v. Alabama*, 310 U.S. 88 (1940), in-person urging of a boycott outside the targeted business, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and verbal "harassment" and "interference" with hunters, *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988), then it must also protect Petitioners' efforts to communicate their Pro-Life message on public sidewalks, even if and when that message is unwelcome. *Accord Madsen v. Women's Health Center*, 114 S.Ct. 2516, 2529 (1994).

II. The Cease-And-Desist Provision Of The Injunction Entered By The Lower Court And Upheld By En Banc Panel Of The Second Circuit Court Of Appeals In This Case Is Clearly Content Based And Punishes Peaceful Speech In Conflict With This Court's Decision In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994) Which Struck Down A Similar No-Approach Zone

In the *Madsen* decision, this Court struck down a no-approach zone not because it extended 300 feet from an abortion clinic, but because it was content based. The obligation of the communicator to retreat was based upon the adverse impact that the communicator's speech had on the communicatee. Likewise, the cease-and-desist provision of the injunction upheld by the Court of Appeals in this case requires communicators to cease and desist communicating with communicatees who express their displeasure with the message expressed by the communicators. This kind of injunction can only be viewed as content based because it gives to potential counselees the right to control the ability of sidewalk counselors to gauge an otherwise protected expression of speech in a public forum.

A. The Cease-And-Desist Provision Was Unnecessary To Achieve The Government Interests In Access To Clinics And In Public Safety

The *Pro-Choice Original Panel* correctly found the cease-and-desist provision in paragraph 1(c) of the preliminary injunction unconstitutional because this restriction makes a speakers' communication dependent on the consent of the audience. *Pro-Choice Original Panel*, 67 F.3d at 371-372 (A-102 to A-104). The *Pro-Choice Original Panel* correctly identified the similarity between the cease-and-desist provision

here and the "no approach" provision struck down by the Supreme Court in *Madsen*. The cease-and-desist provision reads in pertinent part:

> No one is required to accept or listen to sidewalk counseling, and . . . if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, to walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons seeking to counsel that person or group of persons shall cease and desist from such counseling.

See Preliminary Injunction paragraph 1(c), (Appendix A: A-34 to A-35).[8]

The *Madsen* Court struck down a similar provision which ordered that any Pro-Life advocate "refrain from physically approaching any person seeking services of the clinic unless such person indicates a desire to communicate." 114 S.Ct. at 2529 (quoting injunction). This Court held that it could not "justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at 2529.

Although noting that the "cease and desist provision challenged here is somewhat less restrictive than the no approach provision in *Madsen*," *Pro-Choice Original Panel*, 67 F.3d at 71

---

[8] Paragraph 1(c) also provides that, upon refusal by a person entering or leaving the clinic to be counseled, the counselors become subject to the clause in paragraph 1(b) requiring them to retreat to a distance of at least 15 feet on penalty of contempt.

(A-103), the Original Panel also observed that both operated identically in principle and effect:

> [B]oth the cease and desist provision here and the no approach provision in *Madsen* operate to allow the prospective counselee to control the prospective counselor's opportunity to engage in protected expression. The provisions are thus equally restrictive of the communication offered by the counselors; both effectively condition the demonstrator's right to engage in protected expression on another person's wish to hear such expression. 67 F.3d at 371 (A-103).

The key objection to this provision, the Original Panel opined, was the power it gives the prospective counselee to veto another's speech. *Id.* But the audience of a prospective speaker, the Original Panel recognized, cannot enlist the power of the state "to stop the counselor's communication, absent any evidence that the communication is independently proscribable [*see Madsen*, 114 S.Ct. at 2529], or that the counselor is engaging in pure conduct that is not protected by the First Amendment." *Pro-Choice Original Panel*, 67 F.3d at 371 (A-103).

The Original Panel noted that the cease-and-desist provision ran directly afoul of the principle stated in *Boos v. Barry*, 485 U.S. 312, 322 (1988): In public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Thus, the Panel "conclude[d] that the cease and desist provision in paragraph 1(c) [of the preliminary injunction] burdens more speech than necessary to serve the identified government interests." *Pro-*

BEST AVAILABLE COPY

Choice Original Panel, 67 F.3d at 372 (A-104).[9]

The cease and desist provision also burdens more speech than necessary to protect the district court's general goal of ensuring access by allowing one person to veto speech directed at another. The provision allows "anyone or any group of persons" to veto the counseling. Suppose that a woman seeking access to the clinic, who is approached by a sidewalk counselor, chooses to hear what the counselor has to say. Suppose further than an "escort" or companion walking with her (or purporting to walk with her) vetoes any attempt to communicate.

If the counselor continues to communicate with a willing recipient, while a companion objects, the counselor risks a $10,000.00 fine. This is a particularly foreseeable situation considering that facility patrons are often escorted by Pro-Choice Network volunteers who are hostile to Pro-Life counseling and who readily object to every word coming from a Pro-Life counselor's mouth. Nor can it be doubted that a financial motivation exists for facility employees to deliberately trigger the cease-and-desist provision to avoid the loss of business if a sidewalk counselor should successfully persuade a pregnant woman not to abort her offspring.

1. The Injunction Is Content-Based To

---

[9] Incredibly, Respondents below assert that *Madsen* actually requires this court to uphold the "cease and desist" provision. Respondents claim that in both cases mass demonstrations spilled onto the facility driveway, forcing cars to slow down before entering. In the first place, this analogy is false. Respondents tendered no evidence that, after the TRO issued, the number of protesters presented the sort of obstruction/traffic management problem faced in *Madsen*, where up to 400 demonstrators were present at the clinic at one time or another. In the second place, respondents' attempt to force an analogy to *Madsen*'s facts is irrelevant: *Madsen* struck down the "no approach" provision *despite* the presence of mass demonstrations and repeated obstruction.

The Extent It Is Justified To Protect Respondents' Customers From Unwanted Speech

The cease-and-desist provision and the bubble zones both suffer from content-based defects.

First of all, the cease-and-desist provision is flagrantly tied to the unwelcomeness of speech. It is impossible for a defendant to violate that clause without trying to counsel and express a message, and the only reason ever proffered by Respondents or the district court for that part of the injunction was the desire to shield clinic patrons from the allegedly upsetting effect of hearing statements they do not want to hear. But as this Court has emphasized: "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County, Georgia v. Nationalist Movement*, 112 S.Ct. 2395, 2403 (1992). *See also Dorman v. Satti*, 862 F.2d 432, 437 (2d Cir. 1988) (holding that ban on "harassing" of hunters was content based because it was desired to shield from annoying messages). Since the "cease and desist" clause is not content neutral, it cannot be justified as a "time, place, and manner" restriction, and is "presumptively invalid." *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2542 (1992).

Second, both the cease-and-desist provision and the bubble zone suffer from content-based justifications. The district court justified the preliminary injunction, in part, to prevent stress and anxiety to patients and clinic staff.[10] The district

---

[10] "The district court also justified the injunction on the ground that . . . prospective patients at the facilities, as well as staff members, would suffer adverse effects, especially stress and anxiety, from Project Rescue's activities, causing an increase in the risks associated with the abortion procedure." *Pro-Choice Original Panel*, 67 F.3d at 369 (A-97).

court found that under the circumstances "there is an attendant need for a calm, quiet, stress-free atmosphere." *Pro-Choice*, 799 F.Supp. at 1434 (A-168). On this premise, the district court justified the imposition of the bubble zones to avoid stress caused from "invading the [] personal space" of clinic patrons. *Id.* The district court intimated that further communication with persons who "indicated" they no longer wanted to listen was also presumably the cause of stress and anxiety. *Pro-Choice*, 799 F.Supp at 1428, 1434 (A-170). *See also Pro-Choice Original Panel*, 67 F.3d at 369 (A-97).

In short, the district court justified the bubble zones and the cease-and-desist provision on the basis that Petitioners' expressive activity caused emotional stress to clinic patrons and staff workers thereby hampering access. Such a premise, however, fuses the government's legitimate interest in preserving access with the constitutionally suspect government interest in avoiding stress caused by speech.[11] Such fusion is confusion. Collapsing these two distinct interests into one precludes the "precision of regulation" required of an injunction restriction speech and allows the smuggling in of an unconstitutional goal: sheltering persons from effects of otherwise protected speech. Ensuring physical "unimpeded access" might justify a narrowly

---

[11] The district court carefully ignored any possible cause of stress aside from Petitioners' speech. Petitioners' speech, by default, was then targeted and restricted as if it were the only source of stress.

The district court found that the Pro-Choice "escorts often respond by raising their voices in order to drown out the counselors' message, and attempt to block and impede the sidewalk counselors' from following the patients. While the Court can understand the frustration of the escorts, the evidence adduced at the hearings clearly shows that their behavior often serves only to exacerbate an already difficult situation." 799 F.Supp. at 1425 n.6 (A-148). Yet the court completely disregarded the role of escort heckling and blocking in causing patient stress.

tailored regulation, but ensuring emotionally sheltered access does not.

Avoiding communication-related stress is, indeed, a novel "significant government interest." The sort of "First Amendment" that would allow a party in a public place to silence unwanted communication because he experiences emotional stress would be weak indeed. Allowing speech to be curtailed merely because an unwilling listener cries "stress" -- because, for example, he does not wish his conduct to become the object of moral scrutiny or criticism -- would not bode well for the future of the First Amendment, and makes a mockery of its past.

Fortunately, this Court has addressed this exact question. *Madsen*, 114 S.Ct. 2516 (absent evidence that the speech is independently proscribable by injunction); *United States v. Eichman*, 496 U.S. 310 (1990) (Federal Flag Protection Act proscribing flag burning because of the emotional impact on others found unconstitutional); *Texas v. Johnson*, 491 U.S. 397, 407 n.4 (1989) (Texas state statute found unconstitutional because prohibition on speech was triggered by impact it had on citizens' view of the flag as a symbol of national unity); *Boos v. Barry*, 485 U.S. 313 (1988) (federal law protecting foreign embassies from political criticism because of negative feeling generated in audience observing criticism held unconstitutional); *Hustler Magazine, Inc.*, 485 U.S. 46 (1988) (First Amendment precludes state tort claims for intentional infliction of emotional distress caused by speech when the medium of expression itself is not independently proscribable).

When a regulation "suppresses expression out of concern for its likely communicative impact . . . its restriction on expression cannot be justified without reference to the content of the regulated." *Eichman*, 496 U.S. at 317-18 (citation omitted). Doubtless, a regulation prohibiting speech acts "that would cause

serious offense to others . . . , depend[ing] on the likely communicative impact of his expressive conduct . . . is content-based." *Johnson*, 491 U.S. at 411-12. Discussing the validity of a city ordinance upheld in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court said:

> Regulations that focus on the direct impact of speech on its audience present a different situation . . . If the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with [the impact of the speech,] then analysis of the measure as a content-based statute would have been appropriate . . . The emotive impact of speech on its audience . . . must be considered content-based.

Boos, 485 U.S. at 321.

Justifying restrictions by asserting heightened anxiety levels engendered in abortion clinic patrons and staff by Petitioners would run "afoul of our long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Hustler Magazine*, 485 U.S. at 55; *see also NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982). Indeed, the *Pro-Choice Original Panel* found that the district court's justification for the injunction, to avoid "stress and anxiety" in prospective patients and staff members, was of doubtful constitutional validity:

> To the extent that, in this case, an injunction's purpose of avoiding stress to prospective clinic patient is closer to avoiding offense, *see Boos*, 485 U.S. at 321, than to avoiding violence, *see Johnson*, 491 U.S. at 407 n.4, that purpose might constitute a justification that impermissibly refers to content.

Pro-Choice Original Panel, 67 F.3d at 369 (A-98).

It is difficult indeed to conceive of speech on a controversial issue that would not cause anxiety to someone. Respondents seek to persuade this Court that once a person asserts he has suffered stress due to expression, the First Amendment no longer protects the speaker. Once accepted, that rationale would leave the First Amendment in tatters. The bubble zone and the cease-and-desist provisions are content-based censorship to the extent they are justified because of alleged stress or mental reaction of, or emotive impact on, the Respondents' customers and staff.

Ironically, the district court findings concerning the dangers from anxiety and stress due to Petitioners' speech, although clearly expressed, are unsupported by expert medical testimony. There was not one single witness below who testified that he or she had ever suffered any damage, trauma or other cognizable injury other than "stress" because of Petitioners' speech. Not one of those witnesses was even a clinic patient. There was absolutely no evidence that anyone was ever physically denied access or treatment, or suffered physical injury, because of Petitioners' speech activity. Respondents did put on hearsay testimony that a few clinic patrons abandoned their appointments at the clinic because of the presence of the Pro-Life advocates near the facilities. This testimony, however, is hardly reliable for two reasons and irrelevant for another. First, none of the persons alleged to have abandoned their appointments at the clinic actually testified. Second, not one of them was identified so that they could be called as witnesses by the defendants. In fact, all of the witnesses below who said that the patrons told them they were deterred because of the Petitioners' speech activities worked either for an abortion

facility clinic or Pro-Choice Network, *i.e.*, were far from neutral. Despite the district court findings, the record offers not one shred of evidence that proves that a patient was ever denied medical treatment or put at risk because of Petitioners' speech. Finally, even assuming some would-be patrons cancelled out because of anti-abortion activities, this is no reason to restrict speech. The First Amendment would be truly flaccid if it protected only ineffective speech.

CONCLUSION

The Petitioners respectfully request this Court to grant this Petition and correct the manifest damage to the First Amendment wrought by the *Pro-Choice En Banc Panel*.

Dated: New York, NY.
December 26, 1995

Respectfully submitted,

VINCENT P. McCARTHY
(Counsel of Record)
JOSEPH P. SECOLA
McCarthy & Secola, P.C.
8 South Main Street
P. O. Box 1108
New Milford, CT 06776
(203) 355-0923

Thomas Patrick Monaghan
Keith A. Fornier
AMERICAN CENTER FOR LAW
AND JUSTICE - NEW HOPE
6375 New Hope Road
New Hope, KY 40052

John F. Sweeney
Gabriel P. Kralik
MORGAN & FINNEGAN
345 Park Avenue
New York, New York 10154
(212) 758-4800

APPENDICES

APPENDIX A

PRO-CHOICE NETWORK OF WESTERN NEW YORK; Buffalo GYN Women Services, Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D.,

Plaintiffs-Appellees,

v.

Rev. Paul SCHENCK, Dwight Saunders, Defendants-Appellants, Project Rescue Western New York, Operation Rescue, James L. Evans Rev., Ted Cadwallader, Rev., David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Daniel Hamlin, Rev., James Handyside, Pamela Huffnagle, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, John Doe(s), Jane Doe(s), the last being fictitious two names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations and others acting in concert with any of the defendants who are engaging in, or intend to engage in the conduct complained of herein, Project Life of Rochester, Gerald Crawford, and David Long, Defendants.

No. 1215.
Docket 92-7302.

United States Court of Appeals,
Second Circuit.

Argued March 24, 1994.

Decided Sept. 6 1994.

Argued in banc April 17, 1995.

Decided Sept. 28, 1995.

[380][1] Vincent P. McCarthy, New Milford, CT (Joseph P. Secola, McCarthy & Secola, New Milford, CT; Jay Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, Byron J. Babione, American Center for Law & Justice, Washington, DC, of counsel), for Defendants-Appellants.

Lucinda M. Finley, Buffalo, NY (Glenn Murray, of counsel), for Plaintiffs-Appellees.

Deval L. Patrick, Assistant Attorney General, Washington, DC; David K. Flynn, Samuel R. Bagenstos, of counsel, for the United States as Amicus Curiae.

[381] Michael P. Tierney, New York City, for Legal Center for Defense of Life as Amicus Curiae.

Martha F. Davis, Yolanda S. Wu, Deborah A. Ellis, New York City, for NOW Legal Defense and Educations Fund, American Medical Women's Association, B'nai B'rith Women, Catholics for a Free Choice, Center for Reproductive Law and Policy, Connecticut Women's Education and Legal Fund, Inc., Feminist Majority Foundation, Lamda Legal Defense and Education Fund, National Abortion Federation, National Center for Lesbian Rights, National Women's Law Center, Northwest Women's Law Center, National Organization for Women, Women's Law Center, Women's Law Project, Women's Legal Defense Fund, and YWCA of the U.S.A. as Amici Curiae.

Dennis C. Vacco, Attorney General of the State of New York, New York City; Victoria A. Graffeo, Solicitor General,

---

[1] Bracketed numbers in bold type indicate page numbers from decision reported at 67 F.3d 377 (2d Cir. 1995).

Robert A. Forte, Assistant Attorney General, of counsel, for State of New York as Amicus Curiae.

Steven R. Shapiro, Janet Gallagher, Louise Melling, Karen Laiter, New York City, for American Civil Liberties Union Foundation as Amicus Curiae.

Arthur N. Eisenberg, Donna Lieberman, Yueh-ru Chu, New York City, for New York Civil Liberties Union Foundation as Amicus Curiae.

Before NEWMAN, Chief Judge, OAKES, MESKILL, KEARSE, WINTER, MINER, ALTIMARI, MAHONEY, WALKER, McLAUGHLIN, JACOBS, LEVAL, CALABRESI, CABRANES, and PARKER, Circuit Judges.

OAKES, Senior Circuit Judge, with whom Chief Judge NEWMAN and Circuit Judges KEARSE, MINER, WALKER, LEVAL, CALABRESI, CABRANES, and PARKER join:

This appeal was reheard in banc to reconsider the constitutionality of two provisions of an injunction issued against abortion clinic protesters. One provision creates fifteen-foot buffer zones around abortion clinic entrances, driveways, vehicles entering clinic driveways, and patients entering or leaving the clinics; two "sidewalk counselors" are allowed in the buffer zones to "counsel" patients as they approach or leave the clinics. The second provision requires that if a patient expresses a desire to be left alone, the counselors must "cease and desist" and retreat to outside the buffer zone. The issue arises on an appeal by anti-abortion protesters from an order of the United States District court for the Western District of New York, Richard J. Arcara, Judge, issuing the injunction. We hold that inclusion of the two provisions in the injunction was proper, as they burden no more speech than necessary to further significant

government interests. We therefore vacate the portion of the panel opinion striking down these provisions, and we affirm these two provisions as modified.

Background

Plaintiffs-Appellees Buffalo GYN Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, and Alexander Women's Group are health care providers located in Western New York that offer family planning and gynecological services, including abortion services, at their health care facilities. Plaintiff-Appellee Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. Its primary goal is to maintain legal and safe access to family planning and abortion services in the Western New York area.

While the Defendants were comprised of the organizations Project Rescue Western New York, Operation Rescue and Project Life of Rochester, and fifty individuals who oppose abortion and have engaged in demonstrations at or near abortion clinics in Western New York, the only Appellants are the individuals Rev. Paul Schenck and Dwight Saunders.

I. *The Lawsuit*

This case commenced on September 24, 1990, when the Plaintiffs (collectively "Pro-Choice Network") filed suit against the Defendants (collectively "Project Rescue") asserting seven causes of action. The first [382] alleges that the defendants are engaged in a conspiracy to deprive women seeking abortions of the privileges and immunities of national citizenship and the equal protection of the laws in violation of 42 U.S.C. § 1985(3). The remaining six causes of action assert claims based on New

York State law. They are: (1) violation of N.Y. Civil Rights Law § 40-c and N.Y. Executive Law § 296; (2) tortious interference with business; (3) trespass; (4) intentional infliction of emotional harm; (5) tortious harassment; and (6) false imprisonment.

Along with the complaint, Pro-Choice Network filed a motion for a temporary restraining order (TRO) pursuant to Fed.R.Civ.P. 65(b) to enjoin a "blockade" the defendants had announced for September 28, 1990. After a hearing, the district court issued a TRO enjoining defendants from "blockading" the plaintiffs' medical facilities and from harassing the patients and staff entering or exiting those facilities.[1]

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or

---

[1] The TRO stated in pertinent part: ORDERED that Defendants ... are: 1. Temporarily enjoined and restrained in any manner or by any means from: (a) trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities, except that sidewalk counseling by no more than two persons as specified in paragraph (b) shall be allowed; (b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are preformed; Provided, however, that sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, or who is sought to be counseled who wants to have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such an event the persons seeking to counsel that person shall cease and desist from such counseling of that person.

employee of a health care facility where abortions are performed in the Western District of New York, nor shall any person make such sounds which interferes [sic] with the rights of anyone not in violation of this Order; (d) attempting, or inducing, encouraging, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a), (b) and (c) above.

Pro-Choice Network moved to have the TRO converted into a preliminary injunction. With the consent of the parties, the district court ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided. While the motion was pending, Pro-Choice Network filed civil contempt motions against six individual defendants and against Project Rescue, alleging violations of the TRO on six separate occasions (though hearings on only five of these were held prior to the issuance of the preliminary injunction).

II. *The District Court Opinion*

From March 6, 1991, to April 1, 1991, the district court held a hearing on the preliminary injunction motion. The court also held hearings on the civil contempt motions intermittently from February 6, 1991, through January 30, 1992.

A. *Factual Findings*

As a result of the evidence taken at those hearings, the district court, in an opinion and order issued February 14, 1992, made extensive findings of fact, as summarized below.

Project Rescue organizes and participates in "rescue" demonstrations at clinics throughout Western New York, including medical facilities associated with Plaintiffs-Appellees. Through these demonstrations, Project Rescue intends to prevent

abortions, dissuade women from seeking abortion services, and impress upon the public the morality of its "pro-life" views. The demonstrations are mostly peaceful in nature, but they often become emotionally charged encounters between demonstrators, patients and patient escorts.

Project Rescue has stipulated that a physical "blockade," which prevents patients and [383] staff from entering or exiting a medical facility, may be enjoined. Thus, only two demonstration methods used by Project Rescue are at issue in this case: (1) constructive "blockades," in which demonstrators protest and picket in a loud and disruptive manner outside the medical facilities and harass patients and staff entering and exiting the facilities; and (2) "sidewalk counseling" of patients entering the facilities.

The constructive blockades have the same goal as the physical blockades--preventing utilization of the clinics. Instead of physically blocking patient access to the clinics, Project Rescue constructively blockades the clinics by forcing patients and staff to run a gauntlet of harassment and intimidation.

> At times, demonstrators yell at patients, patient escorts and medical staff entering and leaving the health care facilities. The demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff.

Pro-Choice Network of Western New York v. Project Rescue Western New York, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992) (*Pro-Choice I*). This harassment and intimidation causes stress and sometimes even physical injury to the patients and medical

staff, and generally disrupts the atmosphere necessary for rendering safe and efficacious health care.

In implementing the constructive blockades, Project Rescue also targets vehicles entering the driveways of the medical facilities:

> Demonstrators frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities. The presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger to both the occupants of the cars and the demonstrators themselves. The demonstrators also make loud and disruptive noises and chant persistently.

Id.

These activities, on some occasions, have so intimidated and confused patients approaching the clinics that they have left the areas, causing them to suffer a delay in obtaining medical care. This delay can increase the risks associated with an abortion:

> For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to

> undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded ... the above-mentioned complications may result.

Id. at 1427. In some instances, as when the women come from a distance, they cannot easily reschedule their appointments once they have been deterred by Project Rescue from obtaining an abortion on the scheduled day.

In addition to constructively blockading the medical facilities, Project Rescue engages in a form of advocacy known as "sidewalk counseling." Demonstrators approach patients entering the clinics, offer them anti-abortion literature, and try to convince them not to have an abortion. While Project Rescue contends that this sidewalk counseling is done in a peaceful manner, the demonstrators often become angry and frustrated when patients persist in entering the clinics:

> The "counselors" then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering. They continue to do so even after the patients signal their desire to be left alone. The "sidewalk [384] counselors" often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level.

Id. at 1425. Many of the sidewalk counselors have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff.

The patients who have been the target of Project Rescue's "sidewalk counseling" and other "rescue" efforts usually enter the medical facilities shaken and severely distressed:

> Several of the plaintiff health care providers testified that, for most women, the decision to undergo an abortion is already difficult and stressful. Plaintiffs presented uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

Id. at 1427. In addition, the patients are often too agitated to undergo medical procedures, and thus must postpone their appointments--although they may well again encounter the demonstrators upon their return. In such cases, the delay in treatment may increase the risks associated with the medical procedures as discussed above.

Finally, "[l]ocal law enforcement has been unable to respond effectively to plaintiffs' complaints about 'pro-life'

demonstrators harassing patients and blocking access to the clinics." *Id.* at 1426. The protests occur continually, and the local police do not have the resources to monitor the situation constantly. A number of protesters have been prosecuted under local laws, but have not been deterred from repeatedly engaging in their illegal pattern of activity.

B. *The Injunction*

Based on these facts, the district court found that Project Rescue's activities threatened to continue into the future, and unless enjoined would cause clinic patients irreparable harm, including increased medical risks and the denial of constitutionally protected rights. The court found that injunctive relief was required to prevent that harm.

The court also found that Pro-Choice Network had demonstrated a likelihood of success on the merits of its § 1985(3) claim, based both on the right to travel and the right of women to choose to have an abortion. It found as well that, having demonstrated a likelihood of success on its claim under § 1985(3), Pro-Choice Network had, by definition, demonstrated a likelihood of success on its claim under New York Civil Rights Law § 40-c. It also found that Pro-Choice Network had demonstrated a likelihood of success on its state trespass claim. As the court decided that these claims provided sufficient grounds for the injunction, it did not address whether an injunction should issue based on Pro-Choice Network's other state law claims.

On February 14, 1992, the court issued the injunction now at issue in this appeal. (the injunction is reproduced as an Appendix to this opinion.) Paragraph 1(a) of the injunction enjoins Project Rescue from trespassing on, sitting in, blocking, impeding, or obstructing access to the entrances, including the

parking lot entrances and driveways, of any medical facility that performs abortions in the Western District of New York.

Paragraph 1(b) creates fifteen-foot buffer zones around the entrances to those medical facilities, their driveways and driveway and parking lot entrances, and around any person or vehicle seeking access to or leaving the facilities. The provision prohibits Project Rescue from demonstrating within the buffer zones except that two sidewalk counselors may enter, as provided in Paragraph 1(c).

Paragraph 1(c) enjoins Project Rescue from physically abusing, grabbing, touching, pushing, shoving, or crowding any people entering or leaving the medical facilities. It also provides, however, that the demonstrators are free to participate in "sidewalk counseling," which the section defines as a conversation of a non-threatening nature by not [385] more than two people. The section further provides that if a person or group of people does not want to be counseled, or wants to leave or walk away, the counselors must "cease and desist" from counseling, and shall then be governed by the provisions of Paragraph 1(b) that prohibit demonstration within the fifteen-foot zone.

Paragraph 1(d) prohibits Project Rescue from using mechanical loudspeakers or sound amplification devices or making any excessively loud sounds which endanger the health of the patients at the medical facilities. Paragraph 1(e) prohibits Project Rescue from aiding or abetting others in acting in violation of other sections of the injunction. Paragraph 2 provides for penalties of $10,000 and up per day for violations of the injunction.

The district court carefully reviewed the terms of the injunction to ensure that the provisions did not violate Project

Rescue's First Amendment rights. As the court's decision was issued before the Supreme Court's recent opinion in *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 *reh'g denied*, ___ U.S. ___, 115 S.Ct. 23, 129 L.Ed.2d 922 (1994), the court applied the then-controlling law on restrictions of time, place, and manner of expression, namely that the restrictions must be (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication of information. *Pro-Choice I*, 799 F.Supp. at 1432 (citing *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)). The court found that the injunction met all three requirements.

III. *The Appeal*

Two individual defendants, Paul Schenck and Dwight Saunders, appealed, pursuant to 28 U.S.C. § 1292(a)(1), from the district court's order issuing the preliminary injunction. While the appeal was pending, the Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). The Court held that a § 1985(3) claim, which requires a showing of some invidious, class-based animus and an interference with rights that are protected against private interference, could not be sustained against anti-abortion activists because an opposition to abortion does not reflect an animus toward women in general, and because anti-abortion activists do not conspire with the goal of interfering with interstate commerce.

Soon after *Bray* was issued, Project Rescue moved in district court to dismiss the complaint and vacate the injunction.

It argued that Pro-Choice Network's § 1985(3) claim should be dismissed pursuant to *Bray*, and that, after the federal claim was dismissed, the pendent state claims should be dismissed as well. The appeal from the issuance of the injunction was dismissed by stipulation of the parties, without prejudice to reinstatement by any party within twenty days of the district court's resolution of Project Rescue's motion.

Upon consideration of the motion, the district court dismissed the § 1985(3) claim, with leave for Pro-Choice Network to amend its complaint to bring the § 1985(3) claim within the holding of *Bray*. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 828 F.Supp. 1018, 1027 (W.D.N.Y. 1993) (*Pro-Choice II*). The court further held that, even without the § 1985(3) claim, it was "compelled, under notions of judicial economy, convenience, fairness and comity, to continue to exercise jurisdiction over the remaining state-law claims." *Id.* Thus, the court denied Project Rescue's motion to vacate the preliminary injunction.

Project Rescue appealed from the district court's refusal to vacate the injunction, and the appeal from the issuance of the injunction was reinstated. A panel of this court heard these consolidated appeals on March 24, 1994, and on September 6, 1994, a divided panel issued an opinion affirming the district court's denial of the motion to vacate and upholding all parts of the injunction with the exception of the fifteen-foot buffer zone and the "cease and desist" provision. Judge Oakes dissented from the portion of the opinion striking down the two provisions. *Pro-Choice Network of Western New York v.* **[386]** *Project*

Rescue Western New York, 67 F.3d 359 (2d Cir. 1994) (*Pro-Choice*).[2]

Appellees petitioned this court for a rehearing in banc. On December 27, 1994, we ordered a rehearing "limited to the issues of whether the District Court erred in including in the injunction the provision concerning a fifteen-foot buffer zone and the 'cease and desist' provision." *Pro-Choice*, No. 92-7302 (2d Cir. December 27, 1994).

Discussion

The sole issues before us on in banc rehearing are whether the district court erred in including in the injunction (1) the 15-foot buffer zone provision and (2) the "cease and desist" provision. In considering these questions, we do not consider whether these provisions continue to be supportable under Pro-Choice Network's remaining state law claims following the dismissal of its section 1985(3) claim; as the *Pro-Choice* panel found, slip op. at 6992-94, --- F.3d at --- - ---, the district court has not yet had occasion to consider these issues. The issue before us, rather, is solely whether the two contested provisions

---

2 This opinion appeared in the advance sheet at 34 F.3d 130-147, but was withdrawn from the bound volume pending a rehearing in banc poll.

impermissibly infringe Project Rescue's First Amendment right to freedom of speech.[3]

[1] The threshold issue is whether the injunction, taken as a whole, is content-based and accordingly subject to strict scrutiny, or content-neutral--that is, justified "without reference to the content of the regulated speech," *Madsen*, --- U.S. at ---, 114 S.Ct. at 2523 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 *reh'g denied*, 492 U.S. 937, 110 S.Ct. 23, 106 L.Ed.2d 636 (1989)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, ___, ___, 112 S.Ct. 2538, 2542, 2544, 120 L.Ed.2d 305 (1992)--and thus subject to less rigorous examination. In light of the Supreme Court's recent opinion in *Madsen*, examining a similar injunction and finding it content-neutral, it is clear that the injunction as a whole is not content-based. In *Madsen*, the Court concluded that the fact that an injunction "restricts only the speech of antiabortion protestors" does not mean that it is content-directed:

> That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group whose conduct violated the court's order happen to share the same opinion regarding abortions being performed at the clinic.

---

3 The issues we address in this rehearing arise solely from the appeal of the district court's *Pro-Choice I* decision. Thus, we consider only the facts that were before the district court at that time and do not consider the evidence that was before the court in *Pro-Choice II* regarding the "Spring of Life" protests which took place after the injunction was issued.

Madsen, ___ U.S. at ___ - ___, 114 S.Ct. at 2523-24. In the instant case, as in *Madsen*, the injunction's purpose is both content- and viewpoint-neutral: the court imposed restrictions on the demonstrators not to suppress their anti-abortion message but "incidental to their antiabortion message because they repeatedly violated the court's original order." *Id.* at ___, 114 S.Ct. at 2524. The injunction was imposed on Project Rescue to prevent the irreparable harm that prospective patients would suffer if Project Rescue's "rescue" activities continued to impede access to abortion services. *Pro-Choice I*, 799 F.Supp. at 1428.

[2][3] Since the injunction's purpose is content-neutral, we apply the test set out in *Madsen* to the contested provisions: whether they "burden no more speech than necessary to serve a significant government interest." ___ U.S. at ___, 114 S.Ct. at 2525. As the Court explained, this test, while not amounting to the strict scrutiny that we have applied to content-based restrictions of speech, is more rigorous than the test that has traditionally been applied to content-neutral regulations of the time, place, and manner of expression. *See, e.g.*, *Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. at 2753 (determining whether the regulations were "narrowly tailored to serve a significant governmental **[387]** interest") (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)). We apply more rigorous scrutiny to an injunction which restricts expression than to legislation which does so, the Court reasoned, because "[i]njunctions ... carry greater risks of censorship and discriminatory application than do general ordinances." ___ U.S. at ___, 114 S.Ct. at 2524.

[4] In applying the *Madsen* test, we first examine whether the government interests identified by the district court are significant. The district court identified three interests served

by the injunction, which closely parallel the three interests identified by the Court in *Madsen*. First, it noted, that government "has a legitimate interest in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Pro-Choice I*, 799 F.Supp. at 1433 (quoting *Roe v. Wade*, 410 U.S. 113, 150, 93 S.Ct. 705, 725, 35 L.Ed.2d 147 (1973); *see also Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526 (finding significant the government's interest in protecting the psychological and physical well-being of abortion patients). Second, the injunction "effectuates the significant governmental interest of public safety" in that it prohibits defendants from blocking traffic entering and leaving the clinics and from pushing or crowding persons as they enter or leave. *Pro-Choice I*, 799 F.Supp. at 1433; accord *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526. Finally, by protecting plaintiffs' rights to travel and to have an abortion, the injunction "serves the significant governmental interest of ensuring 'that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another.'" *Pro-Choice I*, 799 F.Supp. at 1433 (quoting *New York State NOW v. Terry*, 886 F.2d 1339, 1364 (2d Cir. 1989)); accord *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526 (protecting "a woman's freedom to seek lawful medical or counseling services"). We agree, as the Supreme Court did in *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526, that these governmental interests--medical safety, public safety, and access to abortions--are entirely sufficient to justify an appropriately tailored injunction to protect them. Accordingly, we turn to each of the contested provisions of the injunction "to see if it burdens more speech than necessary to accomplish its goal." *Id.*

I. *The Buffer Zone*

Paragraph 1(b) of the preliminary injunction (the "buffer zone provisions") establishes a fifteen-foot buffer zone around the entrances to all facilities in the Western District of New York at which abortions are preformed. The provision enjoins defendants, as well as their agents and representatives "and all other persons ... acting in their behalf or in concert with them," from

> demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons ... shall be allowed[.]

"Sidewalk counseling," as described in paragraph 1(c), consists of "a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel."

In short, this provision establishes what might be deemed a permeable buffer zone with a "floating" fifteen foot radius: demonstrators must remain at least fifteen feet away from each entrance to an abortion facility, the entrance to its parking area and its driveways, and from women, doctors, and other staff at the facility seeking access to or leaving the facility, with the exception that two "counselors" are allowed to enter the buffer zone to engage in "non-threatening conversation" with each person or group of persons approaching or leaving the facility.

[5] Project Rescue contends that the buffer zone provision fails the *Madsen* test in that it "burdens more speech

than necessary" to accomplish its purposes. In particular, it contends, the buffer zone is not necessary to effectuate the goal of securing unfettered access to the clinics because paragraph 1(a) of the injunction, which prohibits Project [388] Rescue from impeding or obstructing access to the clinics, already accomplishes that task.

In evaluating whether the fifteen-foot buffer zone is more burdensome than necessary, we note that the Supreme Court in *Madsen* found a thirty-six-foot buffer zone necessary to protect the government interests enumerated in that case. ___ U.S. at ___, 114 S.Ct. at 2527. The thirty-six-foot buffer zone in *Madsen* was in some ways broader and in some ways narrower than the zone in this case. The *Madsen* zone was narrower in that, while it extended thirty-six feet from clinic entrances, it did not, as in this case, "float" so as to protect persons approaching or leaving the clinic. On the other hand, the *Madsen* zone was broader than the zone before us in two significant ways. First, it extended a more substantial distance--thirty-six feet from the clinic entrances. Second, within that thirty-six-foot zone, the ban it imposed on speech was absolute: it admitted no "sidewalk counselors" or any other form of advocacy within the zone.

The *Madsen* trial court imposed its arguably more restrictive buffer zone on the basis of a record comparable to that considered by the district court in this case. Compare *Madsen*, ___ U.S. at ___ - ___, 114 S.Ct. at 2521-22, with *Pro-Choice I*, 799 F.Supp. at 1423-27. As in this case, the *Madsen* trial court found that the protesters picketed and demonstrated in a way that impeded and blocked public access to the clinics. Also as in this case, it "found that as vehicles heading toward the clinic slowed to allow the protesters to move out of the way, 'sidewalk counselors' would approach and attempt to give the vehicle's occupants antiabortion literature." *Madsen*, ___ U.S.

at ___, 114 S.Ct. at 2521. The *Madsen* court also found that, as in this case, the protests "took their toll on the clinic's patients." *Id.* A clinic doctor testified--just as doctors did in this case--that the anxiety suffered by patients after having to "run such a gauntlet" to enter the clinics increased the risks associated with the abortion procedures. *Id.* Finally, as with the TRO in this case, the trial court found that despite an initial injunction, protesters continued to impede access to the clinics. *Id.*

We are not convinced by the dissent's recitation of distinctions between the record in the instant case and in *Madsen*. See dissent at 400-401, 403 (noting that this case, unlike *Madsen*, "does not ... involve a full-fledged 'blockade,' "that the pickets were "peaceful" and for the most part complied with the TRO, and that "the bulk of the testimony given at the preliminary injunction hearing pertained to events taking place prior to the district court's granting of the TRO").

First, it is uncontested that this case was filed in response to Project Rescue's announcement that it would conduct a blockade on September 28, 1990; the blockade failed to take place only because the district court issued its TRO enjoining the blockade on the day before it was scheduled to occur. Second, although the district court did not that the "rescue" demonstrations "are usually peaceful in nature," 799 F.Supp.at 1423, it also described at great length the "emotionally charged encounters that ensue as demonstrators "yell at patients" and "crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff," *Id.* at 1423-24; and *see supra*, at 401-403 (describing demonstrators' harassment and intimidation of patients and the harmful effect of this behavior).

[6] Finally, we find unpersuasive the dissent's reminder that Project Rescue demonstrators generally complied with the TRO (with some notable exceptions), and that, in issuing the preliminary injunction, the district court thus relied to a large degree on obstructionist activities which had ceased after the TRO was in place. It gores without saying, of course, that district courts routinely issue preliminary injunctions on the basis of activities which, following a TRO, have already ceased. *See, e.g., ICN Pharmaceuticals, Inc. v. Khan*, 2 F.3d 484, 486-88 (2d Cir. 1993). It is also self-evident that the terms of a preliminary injunction need not be confined to those of an earlier TRO, if the evidentiary hearing--whether concerning pre- or post-TRO activity--makes clear that broader protections are warranted; a TRO is a provisional remedy imposed to maintain the [389] status quo until a full review of the facts and legal arguments is available, *see Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1124-25 (2d Cir. 1989). Lastly, nothing in *Madsen* states, or even implies, that a TRO must fail before a broader injunction may be imposed; the *Madsen* Court simply noted that the failure of an initial injunction to accomplish its purpose is one factor which "may be taken into consideration" in evaluating the constitutionality of a subsequent, broader order. ___ U.S. at ___, 114 S.Ct. at 2527.

In this case, the district court found the buffer zones necessary to effectuate both the goal of ensuring access to the clinics as well as the goal of ensuring the safe performance of abortions. Project Rescue's argument that the buffer zones are not "necessary" because Paragraph 1(a) is sufficient to prevent obstruction of clinic entrances ignores the fact that the zones also further the significant government interest of ensuring medical safety, an interest recognized by the *Madsen* Court. ___ U.S. at ___, 114 S.Ct. at 2526. The district court explained:

> In crafting the injunction, the Court has been guided by the paramount need to maintain an atmosphere conducive to the health care functions of plaintiffs' facilities. As the Supreme Court has advised, in evaluating the need for and legitimacy of restrictions on expressive activity, courts must keep in mind the normal functions of the location in question and whether the nature of the demonstration activity is conducive to or disruptive of normal activities. Here, in the context of health care facilities treating women who are already undergoing the stress normally associated with having an abortion, there is an attendant need for a calm, quite, stress-free atmosphere. Defendants' noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in such a setting. The significant governmental interest inherent in providing safe medical care to the public justifies certain carefully drawn restrictions on defendants' expressive activities.

Pro-Choice I, 799 F.Supp. at 1433-34 (citation omitted).

We find the district court's reasoning persuasive. In light of the extensive record documenting Project Rescue's harassment and intimidation of patients, and documenting the effects produced by such harassment, *see Id.* at 1427, we cannot find the fifteen-foot buffer zone broader than necessary to protect patients' health and well-being. The buffer zones are quite specifically tailored to effectuate the goals of the injunction. The protesters are prohibited from demonstrating en masse only within a very short radius--fifteen feet--of clinic entrances, parking lot entrances, driveways, and persons or vehicles

"seeking access to or leaving" the clinics.[4] Project Rescue can still picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by. Within the fifteen-foot buffer, "sidewalk counselors" can engage in individualized, face-to-face communication with persons entering the clinics in an effort to persuade such persons, on a personal level, that abortion is wrong. This provision ensures that the injunction does not hamper Project Rescue's message, only its intimidating method of demonstration.

Project Rescue contends nevertheless that, even if we find that concerns for medical safety justify a buffer zone around patients approaching the clinics, these concerns do not justify the injunctions's broad protection of patients "seeking access to or leaving" the clinics. We disagree. We are not convinced that persons leaving a clinic are any less in need of a buffer zone than those approaching a clinic. A person leaving a clinic may just have received an abortion and may consequently be in a medically vulnerable state. Alternatively, she may have visited the clinic for a preliminary appointment prior to scheduling an abortion, and the prospect of "running the gauntlet" again may deter her from [390] returning. As the district court found, delay--whether of the abortion itself or of a post-abortion check-up--can substantially increase the risks associated with an abortion. *See id.*

---

[4] We do not address the issue, raised by Project Rescue at oral argument, of how far from a clinic a floating buffer zone may reach to protect a person "seeking access to or leaving" the clinic. This is exactly the type of issue that is best left to case-by-case adjudication by the district court. We are confident that the district court will apply a reasonable geographic scope to the phrase "seeking access to or leaving."

[7] In sum, we find the buffer zones fully justified by the record before us. As the Supreme Court has noted, "some deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2527. Although the district court issued the injunction without benefit of the Supreme Court's analysis in *Madsen*, we are fully able to apply the *Madsen* standard to the record below. We conclude that the fifteen-foot buffer zones burden no more speech than necessary to accomplish the governmental interests at stake in this case.

II. *The "Cease and Desist" Provision*

[8] We next examine whether the "cease and desist" provision "burden[s] no more speech than necessary to serve a significant government interest," *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525. This provision confers on women seeking access to abortion facilities the right to refuse counseling at an intimate range within the buffer zone:

> [N]o one is required to accept or listen to sidewalk counseling, and ... if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility.

Preliminary Injunction ¶ 1(c).

As with the buffer zone provision, we begin with *Madsen*. Project Rescue contends that we should strike down this provision because the *Madsen* Court struck down a similar provision which, although more restrictive, "operated identically in principle and effect." Appellants' Br. at 24. As discussed below, we do not find *Madsen* dispositive of this issue.

The *Madsen* Court struck down a provision which ordered demonstrators not to approach any person within 300 feet of the clinic who is seeking the clinic's services "unless such person indicates a desire to communicate." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529 (internal quotes omitted). The Court disposed of this provision in summary fashion, finding that, absent evidence of threats of violence, the provision violated the general maxim that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988)) (internal quotes omitted). The Court concluded:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic.

Id. (emphasis in original).

The categorical "no-uninvited-approach" order of the *Madsen* trial court is significantly different from the "cease and

desist" provision before us. That order gave no opportunity to anti-abortion counselors to proffer their advise at an intimate range unless the counselees "indicate[d] a desire to communicate by approaching or by inquiring of the [counselors]." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2522. They were obliged to remain on the opposite side of the street. *Id.* at ___, 114 S.Ct. at 2526. Even a woman who was willing to receive such counseling could not receive it unless she affirmatively sought it out. This order, in contrast, permits two counselors, acting in a non-threatening manner, to approach for counseling unless the recipient affirmatively refuses to receive such counseling at an intimate range. Thus the "cease and desist" provision is far more solicitous of the demonstrators' interest in approaching their target audience face-to-face and delivering their message. They may [391] approach without being invited and need not retreat unless expressly rejected by a counselee, and then only to a distance of fifteen feet.

Project Rescue contends that the "cease and desist" requirement is impermissibly vague or overboard in several respects. First, Project Rescue notes, the injunction fails to spell out expressly what kind of indication or behavior by prospective "counselees" triggers the requirement that a "counselor" "cease and desist." Paragraph 1(c) states that "if anyone ... wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of person shall cease and desist from such counseling." As Project Rescue notes, the meaning of "in such event" is less than entirely clear: while the reference to a person's "leav[ing]" or "walk[ing] away" is unproblematic, it appears that the "cease and desist" requirement is also triggered by the person's "want[ing] to not have counseling" and "do[ing] that" --a construction that, Project Rescue contends, fails to put "counselors" on proper notice as to when they must leave the buffer zone.

Any vagueness in the provision, however, has already been remedied by the district court. In its February 14, 1992 opinion, the court decided that the "cease and desist" provision will only be enforced if the targeted person or group "indicates, either verbally or non-verbally, that they do not wish to be counseled...." *Pro-Choice I*, 799 F.Supp. at 1434. This interpretation, we think, accords a common sense meaning to the provision and makes clear at what point counseling must cease. Accordingly, we direct the district court on remand to so modify the language of the injunction.

Project Rescue contends, secondly, that he meaning of "cease and desist from such counseling" is unclear. The provision, it contends, may be interpreted to require a rebuffed "counselor" to stop communicating entirely with the woman who has rebuffed the "counselor's" message--a requirement that, it contends, would constitute an unnecessarily broad restriction of defendants' expressive activities. We do not read the provision as Project Rescue urges. "Such counseling," the injunction makes clear, refers to the practice of "sidewalk counseling" described in the preceding sentence: namely, the right of one or two demonstrators to enter the fifteen-foot buffer zone around a prospective patient in order to engage her in "conversation of a non-threatening nature." To "cease and desist from such counseling," accordingly, means to back off from a prospective "counseling" target so that that person is accorded the full protection of the fifteen-foot buffer zone. Once outside this zone, the "counselor," as we see it, may continue advocating his or her beliefs to the woman who has refused them, albeit now from a distance of fifteen feet. The "counselor" remains free as well, of course, to approach anyone else to attempt to "counsel"

them, or to hand out leaflets to passersby, or to demonstrate as she sees fit within the bounds of the injunction.[5]

Thus interpreted, the provision that the parties have dubbed "cease and desist" may more accurately be deemed the "walk away" provision. The purpose of this provision is not, as Project Rescue asserts, to suppress speech because of the anxiety its content produces in its audience, *see Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988), but rather to provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome [392] physical proximity to an extremely vocal group of demonstrators. *Cf. International Soc'y for Krishna Consciousness v. Lee*, ___ U.S. ___, ___, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541 (1992) (applying "reasonableness" standard appropriate to government limitations of speech in nonpublic fora). This purpose is content-neutral, as it is the demonstrators' physical proximity which is regulated rather than their message.

---

5 In thus interpreting the "cease and desist" provision, we do not decide all the issues raised by Project Rescue. We do not decide, for one, whether a "counselor" could be forbidden from coming within 15 feet of a person who has rebuffed his or her advances, in order to "counsel" another person who has not rebuffed the "counselor." Appellees conceded at oral argument that the injunction as written does not bar this. See tr. of oral argument at 21-22. Nothing in the record suggests that such a scenario has occurred. If the issue arises, it may, of course, be addressed by the district court. Also addressable by the district court, on appropriate application, is Project Rescue's contention that its "counselors" cannot be heard because the patient escorts drown out their message. Project Rescue may, of course, apply to the district court for a modification of the injunction on the basis of this or nay other circumstances which arise.

The district court clearly found that, absent this provision, women seeking access to the clinics were "captive" to Project Rescue's invasive conduct and unable to "walk away":

> Defendants surround the facilities and force women seeking access to them to run a gauntlet of demonstrators, picketers and "sidewalk counselors." The evidence adduced at the hearings clearly shows that, even when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message. It is obvious, therefore, that women seeking access to plaintiffs' facilities cannot, as a practical matter, escape defendants' message. Defendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid receiving defendants' message. The only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion. Thus, women entering plaintiffs' clinics are a "captive audience" for defendants' message and the "cease and desist" provision of the injunction is warranted.

Pro-Choice I, 799 F.Supp. at 1436.

The courts have recognized the rights of "captive audiences" to be free not only of unwanted speech occurring outside traditional public fora, *see Krishna Consciousness*, ___ U.S. at ___-___, 112 S.Ct. at 2708-09 (upholding ban on disruptive solicitation of funds in public airport); *Young v. New York City Transit Auth.*, 903 F.2d 146, 158 (2d Cir.) (upholding

ban on subway panhandling out of concern that public transportation be "reasonably safe, propitious and benign"), *cert. denied*, 498 U.S. 984, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990); *see also Lehman v. City of Shaker Heights*, 418 U.s. 298, 303, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974) (plurality opinion) (upholding ban on political advertising on public transportation), but even in traditional fora, in which First Amendment rights are at their zenith, when circumstances indicate a heightened need to protect the right of the listener to be left alone, the courts have done so. *See Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (upholding ban on residential sidewalk picketing given government interest in protecting captive listener's right to privacy in his home). In *Madsen*, the Court acknowledged that an abortion clinic, with the medical risks attendant thereto, presents such circumstances. "[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident," the Court noted, "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." ___ U.S. at ___, 114 S.Ct. at 2526.

The "cease and desist" provision, the district court found, was necessary to protect not only the right of access to abortions but, in effect, the "physical well-being" of women seeking such access and held "'captive' by medical circumstance." On the record before us, we cannot conclude that this finding was erroneous. As a panel of this court has noted in upholding a similar injunction restraining a clinic "rescue" operation, "[i]nsofar as appellants' rights of free speech were exercised in close proximity to individual women entering or leaving the clinics so as to tortiously assault or harass them, appellants' rights ended where those women's rights began." *New York State NOW v. Terry*, 886 F.2d 1339, 1343 (2d Cir.

1989).[6] We agree, **[393]** and we conclude that the "cease and desist" provision passes the *Madsen* test in that it "burden[s] [no] more speech than necessary to accomplish its goal."

Conclusion

For the reasons set forth above, we conclude that both the buffer zone provision and the "cease and desist" provision are constitutional. Accordingly, we vacate the portion of the panel opinion striking down these provisions, and we affirm these provisions as modified. The remainder of the district court's order, which is not before this in banc court, remains affirmed by the panel's opinion.

APPENDIX
PRELIMINARY INJUNCTION

Upon consideration of the evidence introduced at a hearing held on plaintiffs' motion for a preliminary injunction, and at hearings on plaintiffs' motions to find defendants Nancy Walker, Bonnie Behn, Carla Rainero, Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue in civil contempt for violations of this Court's Temporary Restraining Order, and

---

[6] The injunction that this court upheld in *Terry* was similarly in some, but by no means all, respects to the *Pro-Choice* injunction. *See Terry*, 886 F.2d at 1345 n.1. For instance, it contained provisions similar to those in paragraphs 1(a) and 1(c) of the *Pro-Choice* injunction, restraining Operation Rescue from blocking access to clinics or harassing women as they entered, and allowing "sidewalk counseling." It did not, however, create a buffer zone, and its "walk away" provision lacked the "cease and desist" language of the *Pro-Choice* injunction as well as the requirement that rebuffed "counselors" retreat to a distance of fifteen feet from their failed targets. *See Id.*

upon consideration of the complaint and supporting documents, and upon consideration of defendants' stipulations pertaining to the entry of a preliminary injunction against certain conduct and to the binding nature of any preliminary injunction on all named individual and organizational defendants, it is hereby

ORDERED that defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

1. Enjoined and restrained in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are performed in the Western District of New York;

(b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by not more than two persons as specified in paragraph (c) shall be allowed;

(c) physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they

are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. In addition, it is further provided that this right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or such reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site;

(d) using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of a health care [394] facility at which abortions are performed, nor shall any person make such sounds which interfere with the rights of anyone not in violation of this Order;

(e) attempting, or inducing, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a) through (d) above; and it is further

ORDERED that nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights; and it is further

ORDERED that the defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make a good faith effort to

instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated above not to engage or participate in the activities enjoined in paragraphs (a) through (e) above;

2. IT IS FURTHER ORDERED that the failure to comply with this Order by any defendant or anyone acting in their behalf or in concert with them shall be subject to civil damages of $10,000 per day for the first violation of this Order and/or may subject them to criminal contempt proceedings; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine and/or criminal contempt proceedings; and it is further

ORDERED that any amounts collected thereunder shall be paid to the Plaintiff health care facility at which the violation occurred, or to the Registry of the Court if the targeted health care facility is not a Plaintiff; and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorney's fees and related costs incurred by plaintiffs in relation to the enforcement of this Order.

3. Violations of this Order shall be enforced by appropriate motion.

4. IT IS FURTHER ORDERED that the United States Marshal for the Western District of New York shall read this Order as set forth above in Paragraphs 1 and 2 in their entirety at the site of a demonstration or protest at a facility at which abortions are performed in the Western District of New York. Plaintiffs' counsel shall be responsible for notifying the Marshal

in a timely manner of the location of such demonstration or protest activity.

5. It is the Court's intention that nothing contained in this Order shall supersede or diminish the obligation of local and state law enforcement authorities to fulfill their duties and responsibilities in enforcing state laws and local ordinances.

6. This Order shall remain in full force and effect until modified by further Order, or until final resolution by this Court of the claims for permanent injunctive relief in the above captioned matter.

It is so ordered.

WINTER, Circuit Judge, with whom NEWMAN, Chief Judge, KEARSE, MAHONEY, McLAUGHLIN, JACOBS, WALKER, LEVAL, CALABRESI, and CABRANES, Circuit Judges, join, concurring in the result:

[9] I concur in the result. I write separately because I believe that Judge Oakes's opinion is an application of a somewhat broader principle than it acknowledges, namely that the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs.

[10] Where advocacy is involved, the core notion of the First Amendment is the familiar marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). The goal is to keep channels of communication free of governmentally imposed impediments so that individuals who want to persuade their fellow citizens to adopt a particular belief or to alter intended conduct will have an opportunity to do so. *Kovacs v. Cooper*,

336 U.S. 77, 87, 69 S.Ct. 448, 453, 93 L.Ed. 513 (1949) (plurality opinion).

[395] [11] The notion of a marketplace of ideas gives primacy to the right to persuade largely for two reasons. First, we justifiably fear that those who govern will be relentlessly tempted to censor their critics. It is difficult to conceive of a working democracy that does not in some way protect those seeking to speak to votes in the hope of unseating those in power. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 276, 84 S.Ct. 710, 724, 11 L.Ed.2d 686 (1964) ("broad consensus" that restraint upon criticism of government and public officials is "inconsistent with the First Amendment"); *Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1436-37, 16 L.Ed.2d 484 (1966) ("major purpose" of the First Amendment is to protect free discussion of governmental affairs). Second, we want citizens to have exposure to competing ideas in the faith that truth and humane values will have the best chance of prevailing under such a system. *See Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); *Whitney v. California*, 274 U.S. 357, 375-76, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). This is, as stated, a matter of faith and not empirically testable. It may also be easy to quarrel with intellectually, until one is asked to fashion a workable, alternative system for the real world. Where advocacy is concerned, therefore, the First Amendment is concerned with persuasion.

[12][13] However, the goal of freeing advocacy from governmental control has important, sometimes overriding, implications for audiences as well as speakers. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970) ("[T]he right of every person 'to be let alone' must be placed in the scales with the right of others

to communicate."). A legal rule implementing a market-place of ideas protects advocates in the interests of the audience. *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8, 106 S.Ct. 903, 907, 89 L.Ed.2d 1 (1986) ("By protecting those who wish to enter the marketplace of ideas ..., the First Amendment protects the public's interest in receiving information.")(plurality opinion). It inexorably requires that individuals who are subject to advocacy be left free to make up their own minds and to adhere to their convictions or intended courses of conduct should they remain unpersuaded. Advocates have a right to a full opportunity to appeal to reason, interest, policy, or morals, but they have no right to seek to alter the mind or conduct of the audience by coercion or obstruction. *See Rowan*, 397 U.S. at 738, 90 S.Ct. at 1491 ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."); *Kovacs*, 336 U.S. at 86-87, 69 S.Ct. at 453 (A visitor cannot "insert a foot in the door and insist on a hearing, " and a passer-by may be "offered a pamphlet in the street but cannot be made to take it."); Schneider v. State, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) (acknowledging right to distribute literature "to one willing to receive it"); *cf. International Soc'y for Krishna Consciousness, Inc. v. Lee*, ___ U.S. ___, ___, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541 (1992) ("risk[ ] of duress" presents an "appropriate target of regulation"). Those who seek to do more than peacefully persuade individuals, therefore, are themselves acting in a way quite inconsistent with a marketplace of ideas.

[14][15] We thus need not tolerate coercive or obstructionist conduct solely because it serves some passionate ideology or interest. The First Amendment protects peaceful communication, not self-indulgence. Nor need we tolerate such conduct because it makes the advocate feel good. The First Amendment is not a governmental version of the psychiatrist's couch.

[16][17] In determining whether conduct is coercive or obstructionist, some leeway or legal "breathing space" should be allowed to the advocate so that censorship is not disguised as the keeping of order. *See Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988); *Cohen*, 403 U.S. at 26, 91 S.Ct. at 1788. For example, shame is a form of persuasion often expressed in epithets indicating immorality or selfishness that may be regarded by a substantial segment of the public as insulting. However, insults that contains neither threats of coercion that intimidate nor fighting words that create the possibility of imminert violence, *see Chaplinsky v. New Hampshire*, 315 U.S. [396] 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), must be tolerated. Polarizing debates lead to strong language, and an attempt to impose rules of etiquette wold inhibit the debate by forcing speakers to weigh every word and empower government with far too much discretion to define permissible and impermissible modes of advocacy.

[18] The leeway afforded advocates is the greatest where the audience is the general public or is a voluntary rather than involuntary participant. *See Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, ___, 114 S.Ct. 2516, 2527, 129 L.Ed.2d 593 (1994); *Frisby v. Schultz*, 487 U.S. 474, 484-85, 486, 108 S.Ct. 2495, 2502-03, 2503, 101 L.Ed.2d 420 (1988). The general public is a diffuse body that is not easily coerced by words or non-violent symbolic acts. Where more than fleeting exposure to the advocacy is avoidable, moreover, the chance of coercion is low.

[19] However, where specific individuals are targeted at locations difficult or inconvenient for them to avoid, the First Amendment's tolerance of plausibly coercive or obstructionist protest is least, precisely because the temptation and opportunity for coercion or obstruction are at their greatest. *See, e.g., Frisby*, 487 U.S. at 486, 108 S.Ct. at 2503 (affording lesser protection for "targeted picketing" that "inherently and offensively intrudes on residential privacy"). The law need not blind itself to the fact that targeted protest is often directed at individuals who have already given considerable thought to the subject at hand, do not agree with the protestor, and are quite unlikely to be moved by peaceful persuasion. In such circumstances, the protestor may become frustrated, refuse to take "no" for an answer, and be tempted to go beyond persuasion in seeking to change the target's views or conduct.

Generally, targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to the protests. Rather, they have been sought out at a particular location that they can avoid only at a cost, *see, e.g., Krishna Consciousness*, ___ U.S. at ___, 112 S.Ct. at 2708 (upholding restrictions on expression at an airport in part because travelers are often weighted down by baggage, in a hurry, and some "cannot easily avoid ... solicitation"), and the opportunity to bring direct coercive or obstructive pressure on the individuals is great, *see Madsen*, ___ U.S. at ___, 114 S.Ct. at 2528 ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."). Moreover, the power of televised pictures of coercive or obstructionist conduct to chill others is considerable and an independent reason motivating some protestors to go beyond peaceful persuasion. For example, one may be legitimately skeptical about whether residential picketing is designed to persuade anyone by the strength of the argument presented. *See, e.g. Frisby*, 487 U.S. at 486, 108 S.Ct. at 2503 ("[P]icketing ... narrowly directed at [a] household ... do[es] not seek to

disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."). Rather, it seeks to compel the homeowner to buy peace by abandoning convictions and to warn those who might share the homeowner's convictions to alter their views or suffer the same fate.

[20] In my view, therefore, there is no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot be fairly described as an attempt at peaceful persuasion. Moreover, an extensive record of coercion or obstruction is not required to justify an injunction requiring physical separation and an end to such conduct. The power of even isolated threats or obstructions to exert a chilling effect on some members of society need not be ignored. The timid have a right to go about their business, and it is no embarrassment for a federal court to say so.

[21][22] My emphasis on protecting targets of protest from coercive or obstructionist conduct should not be mistaken for a failure to acknowledge that the state has **[397]** other interests in preventing such behavior. In *Madsen*, for example, the Court noted the state's "strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." ___ U.S. at ___, 114 S.Ct. at 2526. Society has a strong interest in permitting businesses, universities, and medical clinics to operate, in protecting commerce and the flow of traffic, and in allowing individuals to have privacy in their residences and otherwise to use their property. These are important interests and are frequently invoked to justify restraints on protestors. However, I believe it worth emphasizing that coercion or obstruction does not gain First Amendment protection simply because no one is physically injured, traffic

moves, and private property is not invaded. A placid scene that is the result of citizens not going where they wish to be in order to avoid bullying is hardly consistent with a marketplace of ideas.

[23] I would also note that my views are not an application of doctrines concerning public or non-public fora, *see Krishna Consciousness*, ___ U.S. at ___, 112 S.Ct. at 2705; *Hague v. CIO*, 307 U.S. 496, 515-16, 59 S.Ct. 954, 963-64, 83 L.Ed. 1423 (1939) (Roberts, J.), or captive audiences, *see Frisby*, 487 U.S. at 484-85, 108 S.Ct. at 2502-03; *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 468, 72 S.Ct. 813, 823, 96 L.Ed. 1068 (1952) (Douglas, J., dissenting), although those doctrines inform some of the distinctions discussed above. Those doctrines define circumstances in which government may restrict speech that is otherwise protected. My point is that coercive or obstructionist conduct is not protected by the First Amendment in any forum and regardless of the nature of the audience. As noted, the legal breathing space afforded the protestor in defining coercion or obstruction may vary according to the forum and ability of the audience to avoid the protest at little cost. However, actual coercion or obstruction is not protected speech at any time or in any place.

Turning to the present case, affirmance of the district court is dictated generally by this principle. The protests here were not directed at the general public. The targets were particular individuals who either worked at, or were patients of, the abortion clinic. The location was selected precisely because the targets had to choose either to pass by the protestors or to quit work or forgo services at the clinic. There was, moreover, under either the view of the panel majority or panel dissent, a considerable amount of obstruction and bullying by both the protestors and the self-described counselors. It appears undisputed that a physical blockade of the clinic was planned and

was forestalled only by the issuance of a temporary restraining order. *Pro-Choice Network v. Project Rescue*, 799 F.Supp. at 1424. Moreover, numerous coercive and obstructionist acts occurred before the order issued. The protestors "crowd[ed] around people trying to enter the facilities in an intimidating and obstructing manner, and grab[bed], push[ed] and shov[ed] the patients, patient escorts and staff .." *Id.* The self-described counselors would become "angry and frustrated" when persons showed indifference to their proffers and would "then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts...." *Id.* at 1425. The counselors would "often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level." *Id.* After issuance of the restraining order, at least two further acts of obstruction occurred.

In *Madsen*, the Supreme Court approved an injunction barring anti-abortion protestors from entering a 36-foot zone around the entrances to an abortion clinic. ___ U.S. at ___, 114 S.Ct. at 2527. The majority of the panel that originally decided this appeal believed that the record in *Madsen* revealed a considerably greater history of disruption than does the record in the instant matter. *Pro-Choice Network v. Schenck*, 67 F.3d 359, 371 (2d Cir. 1994). I agree. However, the 15-foot buffer zone is not a significant infringement upon speech and does not require an extensive record of bullying to be justified. A nose-to-nose confrontation is hardly essential to the conveying of the protestors' views and will, given their history of intimidation, be reasonably perceived by those seeking to enter the clinic as intimidating.

[398] I also see no constitutional violation in the cease and desist order directed at the counselors. They distinguish their role from that of protestors by claiming that they seek only

to provide patients with information relating to the availability of alternative services, etc. However, some of the counselors in the instant matter have in the past resorted to bullying as soon as their proffer of advice was rebuffed, and I see no First Amendment barrier to a requirement that, once the would-be counselors have had an opportunity to offer advice and it is declined, they must respect the buffer area applicable to protestors.

Moreover, the court is unanimous in the view that some form of injunction was justified, and Judge Arcara's order was an entirely reasonable response to the events that occurred. Indeed, an order that commands a specific physical separation but does not prevent communication in an ordinary tone of voice gives certainty to the advocate as to what is lawful and thus avoids the risk of a contempt adjudication for violating a vague order not to interfere with entry or exit. One irony of the appellants' position in this court is that they attack the specific portions of the order as unconstitutionally rigid and the more general portions of the order as impermissibly vague.[1]

I thus concur in the result.

---

[1] I do not agree with the panel's view that, because the protestors generally (but not entirely) complied with the restraining order, a more specific buffer zone and cease and desist provision could not be imposed by the preliminary injunction. The bullying and planned blockade did not disappear from the record because most of the protestors were on good behavior while the preliminary injunction was under consideration. In my view, the district court had ample discretion to impose specific restraints in the preliminary injunction to insure that such conduct was not renewed.

JACOBS, Circuit Judge, with whom MAHONEY, Circuit Judge, joins, concurring in the result:

I join fully in Judge Winter's opinion. I write separately to frame my concern that Judge Oakes' opinion invokes a set of governmental interests so narrowly drawn as to be message specific.

Judge Oakes' opinion repeatedly describes the governmental interests at stake in terms of vulnerable and agitated patients seeking a potentially dangerous medical procedure in the tranquil precincts of a clinic. Since the only other governmental interest emphasized by Judge Oakes' opinion is the interest in preserving abortion rights, the Appellants are to be forgiven if they suspect that the opinion and rationale can have no realistic application other than the regulation of anti-abortion protest.

Of course, the rationale for any injunction affecting speech will take account of specific circumstances and the conduct of the individuals whose expression is affected. The governmental interests invoked to justify a restraint on protests, however, should not be so narrow that they squelch only one side of a single controversy.

I vote to uphold the injunction for the reasons stated in Judge Winter's opinion, and because I think the result is required by *Madsen*. The rationale adopted in *Madsen*, however, was not message specific. Although the *Madsen* Court did identify "governmental interests" in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy", and in the "physical well-being of the patient held 'captive' by medical circumstance," *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526, the Court also invoked broader state interests in public safety and the right to travel that transcend the

abortion controversy: "The State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." *Id.*

If the governmental interests justifying the *Pro-Choice* injunction were as narrow as Judge Oakes' opinion describes (the protection of the health and rights of women seeking medical attention at an abortion clinic), the injunction would be much too broad, for it casts a bubble over pedestrians and car passengers regardless of whether a woman--**[399]** let alone a patient--is among them. In their brief, the Appellants iterate that the injunction insulates "clinic patrons and staff," "prospective patients and staff members," and that none of the witnesses claiming to have suffered stress or other injury "was even a clinic patient." (Emphasis added). Thus the Appellants argue that the bubble-zone cease and desist provisions are "content-based censorship to the extent they are justified because of alleged stress or mental reaction of, or emotive impact on, the [clinic's] customers and staff." (Emphasis added).

The bubbles in *Madsen*, which excluded protestors from the areas adjacent to the clinic's entrances, thereby insulated the clinic's clientele as well as other persons entering and leaving the clinic, such as the clinic accountant, nurses and doctors, and friends of the patients. No distinction between patients and other persons would have been feasible in *Madsen* if access for patients was to be secured. This lack of differentiation becomes a problem in *Pro-Choice*, however, because the floating bubble is in the nature of personal armor. Yet the injunction does not limit this protection of personal space to women seeking abortion services, or to groups that include such a woman, or even to a groups of pedestrians or automobile passengers that include at least one woman. Rather, a bubble is cast over every "person

or vehicle seeking access to or leaving" the clinic. Paragraph 1(b). Thus the injunction protects the private space of every male staff member walking alone to the clinic.

Such an injunction cannot be justified solely by a governmental interest in preserving the health (and medical choices) of patients at abortion clinics. Ultimately, the justification for this injunction rests on the government interests set forth in Judge Winter's opinion, and the broad interests identified in *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526 (public safety, the free flow of traffic on public sidewalks and property rights of all citizens).

MESKILL, Circuit Judge, dissenting (with whom Judge ALTIMARI concurs):

Today thirteen of this Court's judges give approval to an injunction which seriously infringes on the constitutional rights of freedom of speech and expression. The reasons for this judgment are stated in two separate opinions, expressing two separate rationales. I refer to the two opinions as the Judge Oakes opinion and the Judge Winter opinion rather than calling either the majority opinion because each has garnered the support of more than half of the members of the in banc court. In my view, neither opinion provides an adequate foundation for the Court's ultimate decision. I therefore dissent.

A careful examination of the entire record in this case should lead to one conclusion: the inclusion of both the buffer zone and the cease and desist provisions in the injunction fails the analysis enunciated in *Madsen v. Women's Health Center*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Indeed, as I read the record, what was done by appellants--the picketing, the leafletting, the voicing of protest--was done in the finest tradition of the First Amendment, hardly justifying so

sweeping an abridgement of free speech. Regrettably, the majority today concludes otherwise, embarking this Court on an ill-fated journey whose destination is the dilution of the public forum doctrine, the very core of the First Amendment. To such a result I cannot agree.

I

Permeating Judge Oakes' analysis is the belief that we should simply defer to the district court's decision, relying on its familiarity with the facts and background of this dispute. In fashioning its injunction, however, the district court proceeded under the "reasonable time, place, and manner" standard. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). Subsequently, the Supreme Court decided *Madsen*, holding that the evaluation of injunctions restricting speech required a "more stringent application of general First Amendment principles." See ___ U.S. at ___, 114 S.Ct. at 2524. In an attempt to convince the reader that the injunction crafted **[400]** under the more lenient "time, place,and manner" standard also satisfies the more "rigorous," *Id.*, *Madsen* standard, Judge Oakes' opinion ignores much of the record and misstates some of what it does not ignore.

Judge Oakes' opinion properly acknowledges that the *Madsen* standard is the appropriate starting point for our analysis of the injunction in this case. Consequently, the opinion purports to apply *Madsen's* standard for evaluating the constitutionality of content neutral injunctions restricting expressive conduct in a traditional public forum: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.*

at ___, 114 S.Ct. at 2525. Indeed, Judge Oakes peppers his opinion with references to the *Madsen* test, citing to it no fewer than ten times. *See, e.g., Oakes* op. at Discussion I ("We conclude that the fifteen-foot buffer zones burden no more speech than necessary to accomplish the governmental interests at stake in this case."); *Oakes* op. at Discussion II ("We agree, and we conclude that the 'cease and desist' provision passes the Madsen test in that it 'burden[s] [no] more speech than necessary to accomplish its goal.'"). Yet, remarkably, the analysis fails to adhere to *Madsen* even once, as evidenced by the opinion's ultimate approval of two provisions of an injunction that clearly ban significantly more speech than necessary to achieve the injunction's legitimate goals.

A. *The Buffer Zone*

One who reads the Oakes opinion must wonder how any disagreement (let alone a dissent) could exist among members of this Court regarding the so-called buffer zone, given that the opinion leaves the unmistakable impression that the facts of this case are so similar to those in *Madsen*. *See, e.g., Oakes* op. at Discussion I ("The *Madsen* trial court imposed its arguably more restrictive buffer zone on the basis of a record comparable to that considered by the district court in this case."). This impression is no accident; indeed, it is purposefully created. For without this mischaracterization the opinion simply could not fit this case into the *Madsen* rule.

In *Madsen*, despite an earlier injunction prohibiting the protestors from blocking access to the clinic, crowds of up to 400 people stood, knelt and sat in the public street leading up to the clinic and in the clinic's entryways, thereby physically preventing potential patients from entering the clinic and slowing the flow of vehicular traffic. *See Operation Rescue v. Women's*

Health Center, 626 So.2d 664, 667 (Fla. 1993), *aff'd in part, rev'd in part, Madsen v. Women's Health Center*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). As patients' cars approached the clinic driveways, moreover, the throngs swarmed the vehicles, "running along side of and in front of [them], pushing pamphlets in car windows." *Operation Rescue*, 626 So.2d at 678 (quoting injunction). The demonstrations at times required the presence of nearly fifty police officers to control the crowds, to ensure the flow of traffic, and to permit patients to enter the clinics. Additionally, the trial court found the demonstrations infused with violence, cataloging the incidents of unlawful acts in its opinion. For instance, threats were made to clinic staff, patients and employees--"[o]n [one] occasion [a clinic] doctor was followed as he left the clinic by a person ... who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle." *Id.* Phone lines were jammed, making it impossible for the clinic to summon emergency aid. The court further noted that stalking of patients and staff was a tactic regularly employed by the demonstrators. In short, the clinic in *Madsen* was subject to the type of "rescue" demonstration activity more aptly described as a "blockade." *See Pro-Choice Network of Western N.Y. v. Project Rescue Western N.Y.*, 799 F.Supp. 1417, 1424 (W.D.N.Y. 1992) (explaining that "blockade" is a large-scale demonstration where demonstrators "sit or lay in the entrances of the clinic in an attempt to block access to and egress from the clinic").

This appeal also involves demonstrations outside abortion clinics. Unlike *Madsen*, however, our case does not, as the district court specifically found, involve a full-fledged **[401]** "blockade." *See Id.* at 1424 n.5 ("Commendably, there have been no physical 'blockades' since the Court issued the [temporary restraining order]."). Rather, on the public sidewalks in front of family planning clinics in the Western

District of New York, a group of five to forty activists distributed literature about abortion and abortion alternatives, engaged in "sidewalk counseling" in an effort to inform and educate, picketed, carried signs, sang, participated in prayer vigils, changed and shouted anti-abortion slogans. The record, moreover, is clear: the protestors obeyed, not disobeyed, the district court's temporary restraining order (TRO), which prohibited them from blocking access to the clinics. At no time did the appellants organize en masse sit-ins, lay down in entryways, link hands or chain themselves together, trespass on clinic premises, or make any other attempt to physically blockade clinic property in an effort to deprive women of their constitutional right to choose an abortion. Indeed, the demonstrations generally were orderly and peaceful, a fact Judge Oakes himself acknowledges. *See Oakes* op. at Background II-A ("The demonstrations are mostly peaceful in nature."); *see also Pro-Choice*, 799 F.Supp. at 1423. With this more accurate picture of the record in mind, I address the constitutionality of the buffer zone.

Paragraph 1(b) of the injunction creates a "First Amendment free zone" around the clinics, banning, as it does, the entire universe of expressive activity within fifteen feet of the clinics, except for the allowance of two sidewalk counselors. The district court provided for the buffer zone in an effort to ensure "unfettered access" to the clinics as well as to "prevent defendants from crowding" patients and invading their personal

space." *Pro-Choice*, 799 F.Supp. at 1434.[1] As the original panel determined, this restriction burdens more speech than necessary to accomplish these goals. *See Pro-Choice Network v. Schenck*, 67 F.3d 359, 370-371 (2d Cir. 1994).

Significantly, paragraph 1(b) is cumulative. Other portions of the injunction, left intact by the panel majority's opinion, prohibit all obstructionist activities, thereby promoting the aforementioned goals. Specifically, paragraph 1(a) of the injunction, without any buffer zone, prohibits protestors from "trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are performed." Indeed, in the words of the district court, paragraph 1(a) covers

> obstructing and impeding access to and egress from the clinics, congregating in private driveways and parking lots, surrounding the cars of patients and staff as they try to enter the driveways and parking lots of the clinics, and crowding, shoving or interfering with patients and staff as they approach the clinic on foot.

Pro-Choice, 799 F.Supp. at 1434. Paragraph 1(c), moreover, bars protestors from "physically abusing, grabbing, touching, pushing, shoving, or crowding" any clinic staff member or

---

[1] The Oakes opinion asserts that the safe performance of abortions was also a goal of the district court in effectuating the buffer zone. The district court, however, never gave this as a stated reason. *See Pro-Choice*, 799 F.Supp. at 1434. Moreover, Judge Oakes offers no explanation whatsoever as to the correlation between the creation of fifteen foot bubble zones around the clinics and the safe performance of abortions in the clinics.

patient. *Id.* at 1440 (emphasis added). Finally, paragraph 1(d) enjoins "using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed." *Id.*

The inescapable conclusion is that "the [buffer] zone provision ... forbids conduct even beyond that which would obstruct or impede access." *Pro-Choice*, slip op. at 6999, ___ F.3d at ___. Indeed, within the fifteen-foot buffer zone, the preliminary injunction restricts such sacrosanct First Amendment conduct as holding a placard containing an antiabortion message, passive leafletting or handbilling, silent picketing and even the mere voicing of protest. The Supreme **[402]** Court, however, consistently has confirmed not only the constitutionally protected status of such activities but their importance in our society. *See, e.g., Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 333 (1988) (stating that law prohibiting display of certain signs "operates at the core of the First Amendment"); *Carey v. Brown*, 447 U.S. 455, 466-67, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980) ("Public-issue picketing,an exercise of ... basic constitutional rights in their most pristine and classic form, has always rested on the highest rung of the hierarchy of First Amendment values.") (quotation and citation omitted, alteration in original); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971) ("This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment."). In light of the extensive protection provided to patients by the other provisions of the injunction, the district court had to establish a specific need for the additional blanket prohibitions imposed by the buffer zone. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525 (instructing courts to pay

"close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech"); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 184, 89 S.Ct. 347, 353, 21 L.Ed.2d 325 (1968) (instructing courts to tailor injunctive relief "as precisely as possible to the exact needs of the case"). Here, the record simply does not support such a need.[2]

In fact, the district court took great pains to note that the demonstrators had complied with the original TRO, which contained no buffer zone provision around clinic entrances. *See Pro-Choice*, 799 F.Supp. at 1424 & n.5. The TRO likewise enjoined the demonstrators from "trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility ... at which abortions are performed." *Id.* at 1440. The demonstrators' post-TRO activities generally

---

[2] The Oakes opinion, quoting the district court with approval, states that appellants' "noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in [this] setting." Oakes op. at Discussion I (quoting *Pro-Choice*, 799 F.Supp. at 1434). While perhaps not obvious from the opinion, these demonstrations did not occur within the health care facilities, they took place on the public sidewalks of the Western District of New York. On public sidewalks, the quintessential public forum, see *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983), "expressive activity will rarely be incompatible with the intended use of the property, as is evident from the facts that they are 'natural and proper places for dissemination of information and opinion,' *Schneider v. State*, 308 U.S. 147, 163 [60 S.Ct. 146, 151, 84 L.Ed. 155] (1939), and from 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague v. CIO*, 307 U.S. [496,] 515 [59 S.Ct. 954, 964, 83 L.Ed. 1423] [(1939)]." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 817, 105 S.Ct. 3439, 3457, 87 L.Ed.2d 567 (1985) (Blackmun, J., dissenting).

did not obstruct or impede access to the clinics, thereby providing no justification for the addition of a buffer zone prohibiting otherwise peaceful protest. Absent evidence that the protestors undermined the district court's goal of ensuring access, *cf. Madsen*, ___ U.S. at ___ - ___, 114 S.Ct. at 2527-28 (finding failure of first injunction a factor justifying buffer zone), the addition of paragraph 1(b) clearly burdens more speech than necessary to serve the significant government interests relied on by the district court.

In an effort to justify the imposition of the buffer zone the Judge Oakes opinion simply asserts that "despite an initial injunction, protestors continued to impede access to the clinics" and that there was an "extensive record documenting Project Rescue's harassment and intimidation of patients." Oakes op. at Discussion I. Such ambiguous statements, however, hardly prove adequate to assure the "'precision of regulation'" demanded by *Madsen*. *Madsen*, __ U.S. at ___, 114 S.Ct. at 2524 (quoting *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 921, 102 S.Ct. 3409, 3430, 73 L.Ed.2d 1215 (1982)). A thorough study of the record fails to convince me that Judge Oakes' assertions are even justified, given that the pickets were peaceful, there were no threats or acts of violence, and the protestors generally obeyed the TRO. In fact, the bulk of the testimony given at the preliminary injunction hearing pertained to events taking place prior to the **[403]** district court's granting of the TRO--a factor the district court apparently failed to recognize when establishing the buffer zone.

One can only assume, then, that Judge Oakes relies on the five instances of contempt to which he briefly alludes. *See*

Oakes op. at Background, section I.[3] Surprisingly, the opinion fails to analyze these violations of the TRO to support the ultimate finding of the demonstrators' intransigence, even though close examination of the factual basis for such an essential conclusion is the customary practice in First Amendment cases. *See, e.g., Claiborne Hardware*, 458 U.S. at 915-16 n.50, 102 S.Ct. at 3420 n.50 ("We must make an independent examination of the whole record ... so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.") (quotations and citations omitted). Importantly, only two of the five contempt violations stemmed from obstructionist behavior, a point well noted in the original panel majority opinion. *See Pro-Choice*, 67 F.3d at 307.[4] One was a March 26, 1991 incident involving Reverends Robert and Paul Schenck in which the two men blocked a doorway to a clinic, and the other was a January 1, 1992 incident involving Reverend Paul Schenck and Daren Drzymala, in which they blocked a facility's driveway. In no way do I condone such behavior nor denigrate the two findings of contempt. However, the Supreme Court's First Amendment jurisprudence clearly requires more than two isolated incidents over the course of one and one-half years before a court may banish an entire protest demonstration from a given area. *See Claiborne Hardware*, 458 U.S. at 915-20, 102 S.Ct. at 3426-29 (discussed *infra*, Part II).

---

[3] While Judge Oakes correctly notes that there were six civil contempt motions filed, there were only five contempt judgments entered. The district court found that Pro-Choice had failed to meet its burden of proving one of the incidents alleged. *See Pro-Choice Network v. Walker*, 994 F.2d 989, 993 (2d Cir. 1993).

[4] The other incidents involved the contemnors' failure to observe the TRO's "cease and desist" provision, a provision whose fatal defects I discuss below.

In sum, while deference must be given to the district court's findings, "no constitutional freedom, least of all the guarantees of the Bill of Rights, [may] be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293, 61 S.Ct. 552, 555, 85 L.Ed. 836 (1941). The reality here is that the TRO, with similar provisions to the preliminary injunction's paragraphs 1(a) and (c) and without the over-inclusive buffer zone, effectively secured "unfettered access" to the abortion facilities, thereby making the buffer zone around the clinics more burdensome than necessary under *Madsen*.

Further demonstrating its failure to adhere to the newly enunciated *Madsen* test, the *Oakes* opinion factors that appellants "can still picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by," *Oakes* op. at Discussion I, into its analysis. Considerations of whether the injunction leaves open alternative channels of communication is an element under the previously-used time, place, and manner test, *see Ward*, 491 U.S. at 791, 109 S.Ct. at 2753, and is not controlling here. As Madsen made clear, "standard time, place, and manner analysis is not sufficiently rigorous" in evaluating injunctions restricting expressive conduct. *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525. Indeed, while fifteen feet seems trivial to Judge Oakes, the testimony at the preliminary injunction hearing indicated that with respect to some of the clinics, particularly the one at 1241 Main Street in Buffalo, fifteen feet puts the demonstrators in front of an entirely different building. At other clinics, in more suburban locales, the buffer zone is considerably larger than fifteen feet as a practical matter, unless appellants attempt to protest in the middle of the street. None of appellants' objectives will be served by a demonstration in front of a building other than one housing an abortion clinic nor at the other end of the block on the other side of the street. As our

own Judge Mansfield stated, "the effectiveness of any demonstration depends on its proximity to the target and the relevant audience." *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 482 [404] (2d Cir. 1980) (Mansfield J., dissenting), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1352, 67 L.Ed.2d 337 (1981). Accordingly, on this record I would uphold the panel's decision to strike the buffer zone as burdening more speech than necessary to achieve the identified goals.

B. *The Cease and Desist Provision*

I next turn to the cease and desist provision. Judge Oakes today declares that those entering or leaving an abortion clinic comprise a special group of privileged citizens, immune from the rigors imposed by the First Amendment and constitutionally permitted, by virtue of their decision to have an abortion, to muzzle those expressing disagreement with their ultimate choice. In its haste to silence those attempting to dissuade women from terminating their pregnancies, however, the *Oakes* opinion ignores the First Amendment's "longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience." *Hustler Magazine v. Falwell*, 485 U.S. 46, 55, 108 S.Ct. 876, 881, 99 L.Ed.2d 41 (1988). As Justice O'Connor once noted in another abortion-related case, "it [is] painfully clear that no legal rule or doctrine is safe from ad hoc nullification ... when an occasion for its application arises in a case involving ... abortion." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814, 106 S.Ct. 2169, 2206, 90 L.Ed.2d 779 (1986) (O'Connor, J., dissenting). The *Oakes* opinion's holding with respect to the cease and desist provision proves to be no exception. Once again, we see the abortion ad hoc nullification machine at work.

We all agree that *Madsen* is the appropriate starting point for our analysis. Thus, one would think that *Madsen's* treatment of a similar, albeit more restrictive, provision would dictate the outcome here. In *Madsen* the state court had ordered the demonstrators to refrain from physically approaching any person seeking the services of an abortion clinic "'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529 (quoting injunction). Assessing the provision, the *Madsen* Court found that it would be difficult to justify enjoining "all uninvited approaches of persons seeking the services of [a] clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at ___, 114 S.Ct. at 2529. Thus, without evidence that the sidewalk counselors' intended communications were "independently proscribable (*i.e.*, 'fighting words' or threats), or [were] so infused with violence as to be indistinguishable from a threat of physical harm," and none was presented, the provision could not stand. *Id.* (citation omitted).

Here, as in *Madsen*, no evidence was introduced before the district court indicating that the attempts of the sidewalk counselors at communicating with the prospective patients, however emotionally charged those encounters might have been, transcended the bounds of protected speech. The communications were not "independently proscribable," that is, they did not fall into the category of "fighting words"--speech which provokes immediate violence, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942)--nor could the communications be perceived as so infused with violence as to be indistinguishable from a threat of physical harm. *See Milk Wagon Drivers*, 312 U.S. at 292-93, 61 S.Ct. at 554-55. Therefore, like the no approach provision

in *Madsen*, *see Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529, the cease and desist provision at issue in this in banc is incompatible with the most basic principle of free expression: "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Boos*, 485 U.S. at 322, 108 S.Ct at 1164 (quoting *Falwell*, 485 U.S. at 56, 108 S.Ct. at 882). Accordingly, the original panel majority, like the Court in *Madsen*, found that the cease and desist provision burdened more speech than necessary to serve the previously identified government interests. *See Pro-Choice*, slip. op. at 7001-02, ___ F.3d at ___.

Judge Oakes seeks to avoid the controlling ramifications of *Madsen* and to justify a total **[405]** departure from its holding by seizing on any distinction, however insignificant, between the two cases. Thus, he tells us that the cease and desist provision here "is far more solicitous of the demonstrators' right to approach their target audience" than the one examined in *Madsen*, *Oakes* op. at Discussion II, as the provision does not completely prohibit sidewalk counselors from initiating conversation with potential counselees. This difference, while real, can hardly serve as the basis for such disparate treatment. Both provisions similarly prove problematic in that they confer on potential counselees the right to control the ability of the sidewalk counselors to engage in otherwise protected expressive speech in a public forum. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529 ("The 'consent' requirement alone invalidates this provision."). Indeed, while the cease and desist provision provides for no express consent requirement, as did the no approach provision in *Madsen*, it does so *sub silentio*, and thereby runs afoul of the First Amendment. *See Boos*, 485 U.S. at 322, 108 S.Ct. at 1164; *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L.Ed.2d 572 (1969) ("It is firmly

settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

Judge Oakes attempts to circumvent this well-entrenched tenet of First Amendment jurisprudence by reliance on the captive audience doctrine. But it is only where an unreceptive audience is truly "captive" that courts will assure the listener protection from offensive speech. The Supreme Court principally has limited application of the captive audience doctrine in the traditional public forum to those cases in which the speaker intrudes on the privacy of the home or its environs, for the "resident is figuratively, and perhaps literally, trapped within the home." *Frisby v. Schultz*, 487 U.S. 474, 487, 108 S.Ct. 2495, 2504, 101 L.Ed.2d 420 (1988) (upholding ordinance banning picketing outside private residences); *see also Florida Bar v. Went For It, Inc.*, ___ U.S. ___, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (upholding ban on lawyer direct-mail solicitations to accident victims and their relatives); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970) (upholding statute that allowed householder to remove name from junk mail lists); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (upholding ban on amplified sound trucks in residential neighborhoods); *see generally Eugene Volokh, Freedom of Speech and Workplace Harassment*, 39 UCLA L.Rev. 1791, 1832-43 (1992) (arguing captive audience doctrine should not apply to listeners outside their homes). Outside of this context the doctrine has been used sparingly--only when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125 (1975) (emphasis added), i.e., where the audience is physically constrained by its environment. *See Lehman v. Shaker Heights*,

418 U.S. 298, 307, 94 S.Ct. 2714, 2719, 41 L.Ed.2d 770 (1974) (Douglas J., concurring) (recognizing riders on public bus to be a captive audience); *cf. Young v. New York City Transit Auth.*, 903 F.2d 146, 158 (2d Cir.) (noting in dicta that passengers riding on subway are akin to a captive audience), *cert. denied*, 498 U.S. 984, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990).

It is difficult to see how a person approaching a clinic on a public street or sidewalk can feel a captive of two counselors who are limited to non-threatening speech and are prohibited from "physically abusing, grabbing, touching, pushing, shoving or crowding" the entrant. In fact, in such traditional public fora the Supreme Court consistently has stressed that the conflict between the right of speakers to disseminate their message, however unpleasant, and the desire to protect individuals from hearing it should be resolved in favor of the First Amendment. *See, e.g., Erznoznik*, 422 U.S. at 212, 95 S.Ct. at 2274 (rejecting captive audience doctrine as basis for upholding ordinance banning the showing of films containing nudity on drive-in movie screens: "The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes . . . . Thus, we conclude that the limited privacy interest of persons on public streets cannot justify **[406]** this censorship of otherwise protected speech on the basis of its content."); *Spence v. Washington*, 418 U.S. 405, 412, 94 S.Ct. 2727, 2731, 41 L.Ed.2d 842 (1974) (per curiam) (rejecting captive audience doctrine as basis for statute prohibiting improper use of the flag, as "[a]nyone who might have been offended could easily have avoided the display"); *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971) (reversing conviction based on display of profanity in public courthouse, as those unsettled by speaker's message "could effectively avoid further bombardment

of their sensibilities simply by averting their eyes"); *see also International Soc'y for Krishna Consciousness v. Lee*, 925 F.2d 576, 586 (2d Cir. 1991) (Oakes, C.J., dissenting) (arguing that travelers in airport are not a captive audience as "the Constitution requires those who are offended by the Krishnas to avoid further bombardment ... by averting their eyes") (quotation omitted), *aff'd in part on other grounds*, ___ U.S. ___, 112 S.Ct. 2709, 120 L.Ed.2d 669 (1992). By holding otherwise, Judge Oakes' opinion today pushes the captive audience doctrine further than any appellate court has ever gone--and to a holding completely unsupported by any precedent in our case law.[5]

Significantly, patients approaching the clinics are not powerless to avoid the message of the sidewalk counselors. Those unwilling to accept non-threatening counseling remain free to do so--however insistent the sidewalk counselors may be, the counselee on the public street or sidewalk can escape the unwanted message simply by continuing to walk towards and entering the clinic. *Cf. Lehman*, 418 U.S. at 307, 94 S.Ct. at 2719 (Douglas, J., concurring) ("One who hears disquieting or unpleasant programs in public places ... can get up and leave. But the man on the streetcar has no choice but to sit and listen.") (quotation omitted). As long as the injunction ensures access to the clinics, which it clearly does, the right to refuse sidewalk

---

[5] The *Oakes* opinion's selective quoting from *Madsen* notwithstanding, that case cannot be read as support for the use here of the "captive audience" doctrine. The *Madsen* Court simply recognized that women in the clinic were "held 'captive' by medical circumstance," *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women approaching the clinic are captive, and nothing in *Madsen* can be read as so holding.

counseling remains secure. Moreover, patients are not forced or compelled to read any of the literature distributed to them outside the clinics. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 78, 103 S.Ct. 2875, 2886, 77 L.Ed.2d 469 (1983) (Rehnquist, J., concurring) ("the recipient ... 'may escape exposure to objectionable material simply by transferring [it] from envelope to wastebasket'") (quoting *Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 542, 100 S.Ct. 2326, 2336, 65 L.Ed.2d 319 (1980)) (alteration in original). While counselors may cause distress to those attempting to enter the clinics, such offense is an inevitable cost of free expression under the First Amendment. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949). This may be small comfort to those confronted with sidewalk counseling but, as Justice Brennan once wrote, "that minor inconvenience is a small price to pay for the continued preservation of so precious a liberty as free speech." *Lehman*, 418 U.S. at 320-21, 94 S.Ct. at 2726 (Brennan, J., dissenting).

Indeed, the patient here is about to choose a course of conduct that is final and irreversible--the termination of the life of a fetus. The choice is a difficult one, perhaps made more so because the information conveyed by the sidewalk counselors may cause the patient to question the wisdom or morality of the earlier decision to terminate the pregnancy. This fact, however, is no reason to give the message less protection than we accord other unwelcome speech, *see, e.g., Olivieri v. Ward*, 801 F.2d 602, 606-08 (2d Cir. 1986) (permitting homosexual group and counter-demonstrators to protest outside St. Patrick's Cathedral), *cert. denied*, 480 U.S. 917 **[407]** 107 S.Ct. 1371, 1372, 94

L.Ed.2d 687 (1987), commercial speech, *see, e.g., New York State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 844 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 511, 130 L.Ed.2d 418 (1994), and even pornography. *See, e.g., Carlin Communications v. FCC*, 749 F.2d 113, 121-23 (2d Cir. 1984) (invalidating regulations on telephone "dial-a-porn" services). It is a sad day for the First Amendment when a message intended to inform women of the consequences of undergoing an abortion occupies a lower rung of protection than that enjoyed by a commercial message on a billboard, *see National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir.), *cert. denied*, 498 U.S. 852, 111 S.Ct. 146, 112 L.Ed.2d 112 (1990), or sexually explicit literature. *See 754 Orange Ave. Inc. v. City of West Haven*, 761 F.2d 105, 111-13 (2d Cir. 1985).

Judge Oakes additionally attempts to justify this gagging of the protestors by asserting that the provision provides "a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." Oakes op. at Discussion II. If it is only "unwelcome physical proximity" that needs to be prevented, however, then surely there are ways to do so short of banishing the entire practice of sidewalk at the counseling command of the counselee. *See Claiborne Hardware*, 458 U.S. at 916, 102 S.Ct. at 3427 (demanding "precision of regulation" in injunctions prohibiting constitutionally protected activity) (quotation omitted).[6] But to say that sidewalk counseling may

[6] Ironically, by forcing the counselors to withdraw fifteen feet and to "continue advocating his or her beliefs to the woman who has refused them" from that distance, *Oakes* op. at Discussion II, the injunction as modified by the *Oakes* opinion forces those who wish to exercise their First Amendment rights to resort to raising their voices, which inevitably leads to a more hostile environment-something to be avoided.

be regulated is not to say that it may be prohibited in its entirety, certainly not at the will of those who dislike the message. *See Bolger*, 463 U.S. at 71, 103 S.Ct. at 2883 ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977)). Indeed, even amicus American Civil Liberties Union, which generally supports appellees' position on the injunction, views the cease and desist provision as too restrictive in this respect.

Further, Judge Oakes' reasoning leads me to question the content (and viewpoint) neutrality of the cease and desist provision.[7] He claims that it is the demonstrators' physical proximity that is regulated rather than their message, thus making the provision content and viewpoint neutral. Testimony largely ignored by the opinion, however, indicates that another "extremely vocal group," the group of patient escorts, is allowed to get physically close to this "vulnerable group of medical patients," often even closer than the sidewalk counselors themselves. As the district court noted,

> [T]he patient escorts also become frustrated and angry by the persistence of the "sidewalk counselors." The patient escorts often respond by raising their voices in order to drown out the "counselors'" message, and attempt to block and impede the "sidewalk counselors" from following the patients .... [T]he evidence adduced at the hearings clearly shows that their

[7] I note that the *Madsen* Court left open the question of whether the no approach provision was content-based. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529 n.6.

> behavior often serves only to exacerbate an already difficult situation.

Pro-Choice Network, 799 F.Supp. at 1425 n. 6. If the cease and desist provision truly was aimed at extremely vocal groups who come within "unwelcome physical proximity" to clinic patients, then the escorts no doubt should be included in the injunction's coverage. That they are not, see *Oakes* op. at n.5, leads to an inescapable conclusion: Judge Oakes' term "unwelcome" does not refer to the physical proximity of the demonstrators, but to their message. Such censorship is entirely impermissible under the First Amendment. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 2403, 120 L.Ed.2d 101 (1992) ("Listeners' reaction to speech is not a content-neutral **[408]** basis for regulation."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, ___, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992) ("The First Amendment generally prevents government from proscribing speech ... because of disapproval of the ideas expressed."); *Boos*, 485 U.S. at 321, 108 S.Ct. at 1163. I need not dwell on this point for long, as even under the less than strict scrutiny test for content-neutral restrictions on speech, the "cease and desist" provision fails to pass constitutional muster.

I would uphold the panel's decision to strike the cease and desist provision as burdening more speech than necessary to achieve the significant interests identified by the district court.

II

Judge Winter's concurring opinion reiterates the unassailable principle that "the First Amendment odes not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about

ordinary affairs." *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972) ("Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment.") (footnote omitted); *Milk Wagon Drivers*, 312 U.S. at 298, 61 S.Ct. at 557 (holding an injunction banning picketing was "justified only by the violence that induced it and only so long as it counteracts a continuing intimidation"). Where attempts to persuade others through the application of force rather than persuasion by reason occur, of course courts should not hesitate to sanction and enjoin such conduct. Indeed, on this ground the original panel majority affirmed the issuance of the preliminary injunction in the first instance and upheld those portions of the injunction restraining the protestors from engaging in violent, unduly coercive or obstructionist behavior. *See, e.g., Preliminary Injunction*, ¶ 1(a) (barring trespassing, blocking or impeding access to clinics); ¶ 1(c) (enjoining "physically abusing, grabbing, touching, pushing, shoving, or crowding" of clinic patients or staff); ¶ 1(d) (prohibiting "making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee").

Where Judge Winter and I part company is in his apparent belief that we may uphold an injunction that sweepingly denies appellants their constitutional right to express their views peaceably without an extensive record documenting coercive, obstructionist or violent conduct. As I read the relevant Supreme Court case law, before an injunction banning both protected and non-protected demonstrative activity may be justified there first must be a showing that such coercive behavior is pervasive, "color[ing] the entire collective effort," *Claiborne Hardware*, 458 U.S. at 933, 102 S.Ct. at 3436, thereby leading to the conclusion that the offending aspects of a demonstration cannot be separately and less intrusively controlled

by any means other than eliminating all peaceful forms of protest. *See, e.g., Milk Wagon Drivers*, 312 U.S. at 294-96, 61 S.Ct. at 555-56 (upholding injunction on peaceful picketing "to prevent future coercion" because the protesting "was set in a background of violence" which was "neither episodic nor isolated"). This is the very essence of *Madsen's* "burdens no more speech than necessary" test. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526 ("We think a standard requiring that an injunction 'burden no more speech than necessary' exemplifies 'precision of regulation.'") (footnote omitted) (quoting *Claiborne Hardware*, 458 U.S. at 916, 102 S.Ct. at 3427). Indeed, if *Madsen's* "burdens no more speech than necessary" requirement may be satisfied merely by pointing to a few isolated instances of coercive or obstructionist behavior in a protest, it is not much of a requirement at all.

Perhaps no case better illustrates this point than *Claiborne Hardware*. *Claiborne Hardware* also involved protest demonstrations where protected forms of expression were intermixed with unduly coercive activity, far more coercive than that encountered in our case. The protests at issue there centered around a boycott of white-owned businesses by a group of Blacks seeking racial equality and integration. During the boycott "sporadic acts of violence ensued." 458 U.S. at 902, 102 S.Ct. at 3420. For instance Charles Evers, the leader of the boycott, told a group that "boycott violators would be 'disciplined' by their own people [409] and warned that the Sheriff could not sleep with boycott violators at night." *Id.* Evers further stated: "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'" *Id.* (footnote omitted). In support of the boycott peaceful and orderly pickets were organized outside of white-owned stores. Further, "store watchers" were posted outside of the boycotted stores to identify those who did business with the merchants. *Id.* at 903, 102

S.Ct. at 3420. The names of these violators were read at meetings of the local NAACP chapter and published in a local Black paper. These boycott violators "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites." *Id.* at 904, 102 S.Ct. at 3421 (quotation omitted). Some, moreover, had shots fired at their houses, bricks thrown through their windshields and had their property damaged.

In response the trial court issued a broad permanent injunction. The order enjoined the protestors from stationing the "store watchers" at white-owned businesses; from "persuading" anyone from breaking the boycott; from"using demeaning and obscene language to or about any person" who continued to trade with white-owned businesses; from picketing outside the white-owned businesses; and from employing any violence against any person or causing damage to any property. *Id.* at 893, 102 S.Ct. at 3415. Despite the evidence of acts of violence and intimidation the Supreme Court nonetheless set aside the injunction. The Court stated that isolated acts of non-First Amendment protected activity could not justify a complete prohibition on all protected forms of expression. Indeed, the *Claiborne Hardware* Court went on to say:

> A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of

> avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees. *Id.* at 933-34, 102 S.Ct. at 3436.

I fear that Judge Winter's concurring opinion looks to the proverbial reptiles of this protest to justify the blanket ban on expression imposed by both the buffer zone and cease and desist provisions. Because I believe that appellees have failed to satisfy their "heavy" burden of demonstrating that the instances of coercion and otherwise unprotected conduct were so pervasive as to color the entire demonstrations, I remain firm in my belief that these provisions unconstitutionally restrict appellants' First Amendment rights.

III

I am confident that the members of our Court will soon come to regret the damage wrought to our First Amendment jurisprudence. Under either rationale offered for today's result the Court effectively reduces *Madsen's* "burdens no more speech than necessary" test to a mere cliche.

I dissent.

ALTIMARI, Circuit Judge, dissenting:

I am saddened by our holding today. Because I believe that the majority of the Court has departed from a proud tradition of zealously protecting the most fundamental of the

freedoms bequeathed to us by our forefathers--the right to speak freely, on a sidewalk or street corner--I respectfully dissent. Unlike the challenged injunction, which I agreed in the original majority opinion was content neutral, I believe that Judge Oake's decision is content based. Were abortion not the issue, our original disposition would have occasioned littler interest and no notoriety. I write separately only to add a few thoughts to the fine dissenting opinion of Judge Meskill, in which I concur.

In *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 129 [410] L.Ed.2d 593 (1994), the Supreme Court articulated a new test to be applied to content-neutral injunctions. The original panel opinion did nothing more than apply the new standard to the injunction issued by the district court. We concluded that two of the several challenged provisions burdened more speech than necessary and thus violated the rule established in *Madsen*. Having searched thoroughly the record, I am at peace with our initial conclusion. Despite the preferred status that has been conferred upon pure speech as exercised in traditional public fora, both majorities today disregard their solemn duties to jealously guard that speech.

The "floating bubble zone" established by the district court, and now reaffirmed by the Court, is an unprecedented and unwarranted incursion on freedom of speech. In *Madsen*, reviewing a factual record that revealed far more intransigence than was present here, the Court upheld a 36 foot buffer zone to "protect[ ] unfettered ingress to and egress from the clinic," ___ U.S. at ___, 114 S.Ct. at 2527, and to ensure that the protesters did not block traffic on the narrow street that afforded vehicular access to the clinic parking lot. The bubble zone was justified by two conditions: (1) protesters whose zeal and belligerence demanded some sort of buffer zone; and (2) a physical setting that left the state court with "few other options to protect access"

to the clinic. *Id.* As is clear from the original majority opinion, neither of these circumstances obtains here.

Had the protesters in question today in fact infringed the rights of the women seeking access to the clinic, I would be the first to uphold restraints against them. I remain persuaded, however, that the protesters tread only upon the sidewalks and streets--a protected setting for the free exercise of persuasive speech--and not upon the constitutional rights of those individuals seeking access to the clinics. Without reciting a record already familiar to the reader, I shall say only that I am perplexed by the Court's apparent disregard of the district court's commendation of Project Rescue's compliance with the TRO, *see Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1424 n.5 (W.D.N.Y. 1992), a finding that speaks volumes to the lack of necessity for this overreaching injunction. Further, it is undisputed that the unusually restrictive physical setting of the *Madsen* clinic is not duplicated here. It is clear that here, where most of the injunction was upheld, *see, e.g.*, Injunction ¶ 1(c) (precluding crowding); *see also Pro-Choice Network v. Schenck*, 67 F.3d at 372-374 (2d cir. 1994), any bubble zone is more burdensome than necessary, much less one which amorphously wafts along immuring any individual coming or going from the clinic. The insidious nature of the bubble is apparent when one considers that it is (1) invisible: a protester may not know that a person has stepped inside a bubble; and (2) chillingly ill-defined: not only does the injunction fail to identify the distance a bubble may travel, but, even if the distance were somehow divined by the district court, a protester has no way of ascertaining that information.

The Court's treatment of the "cease and desist" provision is even more disquieting. As the Supreme Court has instructed, in certain "traditional settings ... First Amendment values

inalterably prevail." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974). In this case, the restrained speech occurred on streets and sidewalks outside health facilities. Yet the Court today chooses to disregard the very foundation upon which our First Amendment freedoms are built. It is axiomatic that "all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988). *Accord Madsen*, ___ U.S. at ___, 114 S.Ct. at 2522 (public sidewalks are public fora); *Lehman*, 418 U.S. at 303, 94 S.Ct. at 2717 (traditional public fora include open spaces, meeting halls, parks, and street corners). And, as perhaps we all need reminding,

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions **[411]** and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949) (citations omitted).

Resort by the Court to the "captive audience" cases as an effort to evade these bedrock principles rings hollow. The teaching of the captive audience cases is that speech aimed at citizens who are in a place "'as a matter of necessity, not choice,'" *Lehman*, 418 U.S. at 303, 94 S.Ct. at 2717 (quotation omitted), may be entitled to less protection than speech aimed at citizens who could freely exercise the option to go elsewhere. *See, e.g., Frisby*, 487 U.S. at 484-85, 108 S.Ct. at 2502-03; *Lehman*, 418 U.S. at 302-03, 94 S.Ct. at 2716-17 (captive audience on public transportation); *Young v. New York City Transit Autho.*, 903 F.2d at 158 (same). The character of the street--abutting a medical facility--"may well inform the application of the relevant test, but it does not lead to a different test; the [disputed restriction] must be judged against the stringent standards [the Supreme Court has] established for restrictions on speech in traditional public fora ...." *Frisby*, 487 U.S. at 481, 108 S.Ct. at 2500. Moreover, as the Supreme Court directed in *Madsen*, we are to apply an even more stringent test than the familiar time, place and manner analysis where injunctive relief is concerned. The Court today flouts that instruction.

I do not dispute that people seeking access to clinics may be, in some sense of the word, "captives." That label, however, suggests only that the state consequently has a legitimate interest in sheltering their physical and psychological well-being. I have no objection to that laudable goal. It is with respect to how that objective is accomplished that I part ways with my colleagues. To my mind, it cannot be said that a prohibition on signs within fifteen feet of an unwilling listener "burden[s] no more speech than necessary." Nor, I think, can it be said that vesting unwilling listeners--even those "en route to a destination,"--with the absolute power to banish speech to a distance of fifteen feet from a moving target burdens no more speech than necessary.

The Court's ability to construe these provisions such that they pass constitutional muster puts me in mind of Lewis Carroll's classic passage:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
> "The question is," said Alice, "whether you can make words means so many different things."
> The question is," said Humpty Dumpty, "which is to be master--that's all."

Alice Through the Looking Glass, Lewis Carroll (1872).

The district court properly found the facts. The Supreme Court gave us the law. And the original majority faithfully applied it, without regard for the subject of the dispute that occasioned issuance of the injunction. The new majorities, however, have sacrificed not only our proper role--to remand a concededly flawed injunction for correction by the district court--but also, in the bargain, the "preferred position" of the First Amendment, *see Beauharnais v. Illinois*, 343 U.S. 250, 285, 72 S.Ct. 725, 745, 96 L.Ed. 919 (1952) (Black, J., dissenting). The question now is "which is to be master--that's all."

> As a result, we have compromised [t]he free trade in ideas which the Framers of the Constitution visualized .... In its place there is substituted a new orthodoxy--an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety, welfare, security, morality, or health of society. Free speech in the constitutional sense disappears. Limits are drawn--limits dictated by

expediency, political opinion, prejudices or some other desideratum of legislative action.

Id.

Like Alice, I am befuddled by the whimsy effected today. I dissent.

APPENDIX B

PRO-CHOICE NETWORK, of Western New York, Buffalo Gyn Women Services, Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D.,

Plaintiffs-Appellees,

v.

Rev. Paul SCHENCK, Dwight Saunders,

Defendants-Appellants,

Project Rescue Western New York, Operation Rescue, James L. Evans, Rev., Ted Cadwallader, Rev., David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Galser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Daniel Hamlin, Rev., James Handyside, Pamela Huffnagle, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, John Does, Jane Does, the last two names being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations and others acting in concert with any of the defendants who are engaging in, or intend to engage in the conduct complained herein, Project Life of Rochester, Gerald Crawford, David Long,

Defendants.

PRO-CHOICE NETWORK, of Western New York, Buffalo Gyn Women Services, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, Alexander Women's Group.

Plaintiffs-Appellees,

v.

PROJECT RESCUE WESTERN NEW YORK, Operation Rescue, Project Life of Rochester, Paul Schenck, James L. Evans, Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Daniel Hamlin, Donna Johanns, James Handyside, Pamela Huffnagle, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Does, Jane Does, the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants-Appellants.

Nos. 1215, 1310, Dockets 92-7302, 93-7918.

United States Court of Appeals,
Second Circuit.

Argued March 24, 1994.

Decided Sept. 6, 1994.

[362][1] Vincent P. McCarthy, Joseph P. Secola, New Milford, CT (McCarthy & Secola, Jay Alan Sekulow, James M. Henderson, Mark N. Troobnick, Byron J. Babione, American Center for Law and Justice, of counsel), for appellants Schenck and Saunders in No. 92-7302.

Laurence D. Behr, Buffalo, NY, A. Lawrence Washburn, Jr., New York City, of counsel, for appellants in No. 93-7918.

Lucinda M. Finley, Buffalo, NY, for appellees.

Before OAKES, MESKILL and ALTIMARI, Circuit Judges.

MESKILL, Circuit Judge:

The principal issue in these appeals is the validity of a preliminary injunction issued by the United States District Court

---

[1] Bracketed numbers in bold type indicate page numbers from decision reported at 67 F.3d 359 (2d Cir. 1994).

for the Western District of New York, Arcara, J.[1] [363] In

---

[1] The pertinent provisions of the preliminary injunction provide: ORDERED that defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are: 1. Enjoined and restrained in any manner or by any means from: (a) trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are performed in the Western District of New York; (b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed; (c) physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. In addition, it is further provided that his right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or such reasonably necessary rules and regulations as

(continued...)

No. 92-7302, the appellants appeal from the order issuing the injunction, *Pro-Choice Network of Western New York, v. Project Rescue Western New York*, 799 F.Supp. 1417 (W.D.N.Y. 1992) (*Pro-Choice I*); in No. 93-7918, the appellants appeal from the district court's denial of a motion to vacate the injunction, *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 828 F.Supp. 1018 (W.D.N.Y. 1993) (*Pro-Choice II*). For the reasons stated below, we affirm in part and reverse in part in *Pro-Choice I*, and we affirm in *Pro-Choice II*.

BACKGROUND

Both appeals arise out of the same underlying case, which commenced on September 24, 1990, when the plaintiffs filed a suit against the defendants alleging, primarily, that the defendants were engaged in a conspiracy to deprive women seeking abortions the privileges and immunities of national citizenship and the equal protection of the laws. The plaintiffs

---

[1](...continued)

they decide are necessary at each particular demonstration site; (d) using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed, nor shall any person make such sounds which interfere with the rights of anyone not in violation of this Order; (e) attempting, or inducing, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a) through (d) above; and it is further ... ORDERED that the defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make a good faith effort to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated above not to engage or participate in the activities enjoined in paragraphs (a) through (e) above.

(collectively "Pro-Choice") include an organization, Pro-Choice Network of Western New York, that seeks to ensure legal access to abortion, as well as individual doctors and clinics in western New York that provide health care services, including the performance of abortions. The defendants (collectively "Project Rescue") are various individuals and organizations, including Project Rescue Western New York, that oppose abortion and have engaged in demonstrations at or near certain abortion clinics in western New York.

Pro-Choice's conspiracy claim against Project Rescue, which alleged that Project Rescue sought to violate women's constitutional rights to seek abortion and to travel, was predicated on the first clause of 42 U.S.C. § 1985(3). That provision states in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Pro-Choice's complaint also alleged six pendent state law claims against Project Rescue, including trespass and violation of New

York Civil Rights Law § 40-c (section 40-c).[2] [364] Pro-Choice sought declaratory and injunctive relief, as well as compensatory and punitive damages.

Simultaneously with the filing of its complaint, Pro-Choice moved, pursuant to Fed.R.Civ.P. 65(b), for a temporary restraining order (TRO) prohibiting Project Rescue from conducting an abortion clinic blockade scheduled for September 28, 1990. After a hearing, the district court granted the TRO, enjoining Project Rescue from blockading any of the plaintiff medical facilities and from harassing patients or staff members as they entered or exited those facilities. In accordance with the TRO, Project Rescue held a peaceful demonstration instead of conducting a blockade on September 28.

With the consent of the parties, the district court extended the TRO pending the parties' briefing on whether the

---

[2] New York Civil Rights Law § 40-c provides in pertinent part: 1. All persons within the jurisdiction of this state shall be entitled to the equal protection of the laws of this state or any subdivision thereof. 2. No person shall, because of ... sex ..., be subjected to any discrimination in his civil rights, or to any harassment ... in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state. New York Civil Rights Law § 40-d provides the remedies for violations of section 40-c. It states in pertinent part: Any person who shall violate any of the provisions of the foregoing section ... or who shall aid or incite the violation of any of said provisions shall for each and every violation thereof be liable to a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby in any court of competent jurisdiction .... In addition, any person who shall violate any of the provisions of the foregoing section shall be deemed guilty of a class A misdemeanor.

TRO should be converted into a preliminary injunction. During this period of extension, Project Rescue moved to dismiss or to stay the action pursuant to the abstention doctrine on the ground that a parallel proceeding was pending in state court. After a hearing, the district court denied the motion. On Project Rescue's motion for reconsideration, the district court agreed to reconsider the denial, but reaffirmed its previous decision on the ground that the pending state action was "'dead in the water'." *Pro-Choice I*, 799 F.Supp. at 1439. Also during the period in which the TRO was extended, Pro-Choice filed motions for civil contempt against several individual defendants and against Project Rescue itself. The district court ultimately granted these motions. *See Pro-Choice II*, 828 F.Supp. at 1028-29; *see also Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) (*Pro-Choice III*) (dismissing for lack of appellate jurisdiction appeals by three individuals against whom motions for civil contempt were granted).

As to whether the TRO should be converted into a preliminary injunction, the district court heard arguments and took evidence, and made numerous factual findings. *See Pro-Choice I*, 799 F.Supp. at 1424-27. The court first found that Project Rescue utilizes several different demonstration techniques: actual physical blockades of abortion facilities, constructive blockades of such facilities, and sidewalk counseling. The court then noted that, because Project Rescue had conceded that the physical blockades could be enjoined and in fact had not engaged in any physical blockades of clinics since the issuance of the TRO enjoining such blockades, the court would focus on the other two demonstration techniques. *Id.* at 1424 n.5.

The district court found that constructive blockades are designed to prevent access to abortion clinics by intimidation or

dissuasion and by physical obstruction of people trying to enter the clinics. Moreover, the court found that constructive blockades involve not only "forcing patients to run a gauntlet of harassment and intimidation," but also picketing, congregating near driveway entrances, making "loud and disruptive noises," yelling, pushing, and shoving. *Id.* at 1424. The court found that these constructive blockade techniques cause stress and physical injury to clinic patients and employees and disrupt the atmosphere necessary for providing medical care.

The court also found that sidewalk counseling, in which demonstrators seek to persuade a patient not to have an abortion, often becomes a "charged encounter" because of "the highly emotional nature of the abortion issue." *Id.* at 1425. These encounters involve harassment, badgering, intimidation and yelling. The court noted that some of the defendants had persisted in sidewalk counseling despite having been arested for harassment. *Id.* at 1424-25.

The district court also made numerous findings regarding the health effects of Project Rescue's demonstrations on women seeking services at the abortion clinics. The court found that "[w]omen who have been the [365] target of 'sidewalk counseling' or other 'rescue' demonstrations usually enter the medical facilities visibly shaken and severely distressed." *Id.* at 1427. The court noted that the stress associated with being the subject of sidewalk counseling exacerbates the stress that often accompanies the decision to seek an abortion, thus increasing the risks associated with having an abortion. *Id.* Also, because some women find it necessary to reschedule their appointments or postpone necessary follow-up procedures because of Project Rescue's demonstrations, delays are created that may also lead to increased medical risks. *Id.*

On the basis of these fact, the district court found that women seeking access to the plaintiff medical facilities would suffer irreparable harm from Project Rescue's activities if no injunction issued. *Id.* at 1428. Moreover, the court found that Pro-Choice had demonstrated a likelihood of success on the merits of its section 1985(3) claim based both on the right to travel and on the right to seek an abortion. In light of the finding of a likelihood of success on the section 1985(3) claim, the district court concluded that Pro-Choice had, "by definition," also established a likelihood of success on the section 40-c claim. *Id.* at 1431. Finally, the court found that Pro-Choice had demonstrated a likelihood of success of the merits of its state law trespass claim. Having thus found that Pro-Choice had made the requisite showing, *see Fireman's Fund Ins. Co. v. Leslie & Elliot Co.*, 867 F.2d 150, 151 (2d Cir. 1989), the court issued a preliminary injunction.

In an effort to ensure the constitutionality of the injunction, the district court carefully reviewed the terms of the injunction pursuant to relevant First Amendment considerations. The court noted that the then-prevailing test for restrictions on the time, place and manner of expression required that the restriction be content neutral and narrowly tailored to serve a significant government interest, and that it leave open ample alternative channels of communication. *Pro-Choice I*, 799 F.Supp. at 1432 (citing *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)).

Applying this test, the court first found that the preliminary injunction was content neutral because it "makes no mention whatsoever of abortion or any other substantive issue" and regulates only "when, where and how defendants may

speak." *Id.* at 1433. The court also found that the injunction would apply equally to people protesting or supporting abortion and to demonstrators for or against other causes, a finding vigorously contested by Project Rescue.

The court then determined that the injunction served three significant government interests: (1) the interest in ensuring that abortions are performed safely; (2) the interest in public safety; and (3) the interest in ensuring that the constitutional rights of one group are not sacrificed for the constitutional rights of another group. *Id.* The court found that the injunction was narrowly tailored to meet these interests. Finally, the court determined that the injunction provided Project Rescue sample alternative avenues of communication because it allowed Project Rescue to engage in many demonstration activities outside the fifteen foot clear zone. *Id.* at 1437.

Two individual defendants, Paul Schenck and Dwight Saunders,[3] appealed from the district court's order issuing the preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). During the pendency of the appeal, the Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, ___-___, 113 S.Ct. 753, 759-60, 122 L.Ed.2d 34 (1993), holding that a section 1985(3) claim, which requires a showing of some invidiously discriminatory, class-based animus, could not be sustained where the only class-based animus alleged was animus against women as evidenced by opposition to abortion.

Project Rescue thereafter moved in the district court for dismissal of the complaint and for vacatur of the injunction,

---

[3] For convenience, we will refer to these appellants, as well as the appellants in *Pro-Choice II*, collectively as "Project Rescue."

contending [366] that *Bray* compelled the dismissal of Pro-Choice's section 1985(3) claim and that, after dismissal of that sole federal claim, dismissal of the pendent state claims and vacatur of the injunction were also warranted. By stipulation of the parties, the appeal from the issuance of the injunction was dismissed without prejudice to reinstatement by any party within twenty days of the district court's resolution of the motion to dismiss the claims and to vacate the injunction. See *Pro-Choice II*, 828 F.Supp. at 1028 n. 9.

The district court granted Project Rescue's motion in part, dismissing the section 1985(3) claim with leave to amend the complaint, but refused to dismiss the state law claims or to vacate the injunction. In refusing to vacate the injunction, the court stated that "[t]he Court's decision to exercise pendent jurisdiction over the state-law claims, regardless of the ultimate disposition of the § 1985(3) claim, leaves without question the viability and continued enforceability of the preliminary injunction." *Pro-Choice II*, 828 F.Supp. at 1032. Project Rescue subsequently appealed from the district court's refusal to vacate the injunction, *see* 28 U.S.C. § 1292(a)(1), and the appeal from the issuance of the injunction was reinstated.

Because they arise from the same underlying case, we consider Project Rescue's two appeals together. In the appeal relating to the issuance of the injunction, No. 92-7302, Project Rescue contends that: (1) no injunction is permitted under section 1985(3); and (2) the injunction unconstitutionally restricts expression that is protected by the First Amendment. Project Rescue does not challenge the portion of the injunction that prohibits it from physically blockading the abortion clinics. In the appeal relating to the district court's denial of the motion to vacate the injunction, No. 93-7918, Project Rescue contends that: (1) no injunction is permitted under section 40-c and the

restrictions on expression imposed by the injunction exceed that permitted pursuant to the state law trespass claim; (2) the district court should have limited the injunction's contempt fines to the amount allowed under New York law; and (3) the court should have abstained from adjudicating this case.

After oral argument in these cases, the Supreme Court decided *Madsen v. Women's Health Center*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), in which the Court approved in part and disapproved in part an injunction prohibiting abortion opponents from engaging in certain activities near an abortion clinic in Melbourne, Florida. We allowed the parties to submit letter briefs addressing the effect of *Madsen* on the issues before us.[4]

Discussion

I. *Standing*

[1] Project Rescue contends that Pro-Choice lacks standing to seek an injunction against Project Rescue's activities. The basis of Project Rescue's argument is the novel proposition that an injunction restraining the time, place and manner of protected expression is inappropriate in cases involving private litigants because only government interests can justify such an injunction. Project Rescue maintains that Pro-Choice, a private entity, has standing to assert only its own private interests and, therefore, cannot assert the government interests required to

---

[4] In its letter brief, Project Rescue challenged, for the first time, the validity of the injunction's civil contempt provisions, arguing that any violation of the injunction should be treated as criminal, rather than civil, contempt. This issue is not properly before us on this appeal and we do not consider it.

support a restraint on expression. We reject Project Rescue's contention because it improperly collapses two distinct issues: whether a litigant has standing to assert certain substantive claims against another party and whether an injunction restricting activity protected by the First Amendment is warranted.

Here, Pro-Choice had standing to assert its claims against Project Rescue because Pro-Choice alleged in its complaint that Project Rescue's activities caused Pro-Choice to suffer a concrete injury, that there was an immediate threat that Project Rescue would continue its allegedly injurious activities, and that the injuries were likely to be redressed [367] by injunctive relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 110-11, 103 S.Ct. 1660, 1669-70, 75 L.Ed.2d 675 (1983). Having thus established its standing to maintain its claims against Project Rescue, Pro-Choice was entitled to argue that injunctive relief was a proper remedy because certain government interests would be furthered by the issuance of such relief. Project Rescue's standing argument thus fails.

II. *Abstention*

[2] Project Rescue contends, in its appeal from the district court's refusal to vacate the injunction, that the court should have abstained from adjudicating this case in deference to an identical, ongoing state court proceeding. This claim, however, is not properly before us. Indeed, Project Rescue did not seek to raise the abstention issue in the district court as part of the motion to dismiss and to vacate. Moreover, because the district court did consider the abstention issue in the course of granting the preliminary injunction, *see Pro-Choice I*, 799 F.Supp. at 1439, Project Rescue could have challenged the

district court's decision not to abstain in its appeal from the issuance of the preliminary injunction. Having failed to do that, Project Rescue has waived its challenge to the district court's refusal to abstain.

[3] Furthermore, we reject Project Rescue's challenge, raised in the midst of its "abstention" claim, to the district court's decision not to relinquish jurisdiction over the pendent state law claims even after dismissing the only federal claim. The district court carefully and thoroughly analyzed the appropriate considerations, *Pro-Choice II*, 828 F.Supp. at 1027-32, and its determination to retain jurisdiction over the pendent state law claims accords with the governing case law. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50 & n.7, 108 S.Ct. 614, 618-19 & n.7, 98 L.Ed.2d 720 (1988); *Enercomp, Inc. v. McCorhill Publishing*, 873 F.2d 536, 545-46 (2d Cir. 1989).

III. *Scope of the Injunction*

Project Rescue wages several attacks on the scope of the injunction. First, it alleges that the district court erred in refusing to vacate the preliminary injunction because (a) the injunction imposes impermissibly high contempt fines, (b) the injunction's substantive restrictions on expression go beyond that which is permissible to redress repeated trespasses, and (c) the section 40-c claim no longer states a claim upon which relief can be granted. Second, Project Rescue contends that the district court erred in issuing the injunction because (a) certain provisions violate the First Amendment, and (b) certain provisions are vague and, therefore, violate due process. Finally, Project Rescue asserts a variety of additional contentions challenging the validity of the injunction. We address Project Rescue's claims in turn.

A. *State Law Limits on Injunction*

[4] Project Rescue contends that several aspects of the injunction exceed that which is permissible pursuant to New York law. First, Project Rescue asserts that the contempt fines prescribed in the injunction are higher than is allowable pursuant to New York state law. Project Rescue also contends that, because section 40-c does not authorize injunctive relief and the only permissible basis for the injunction is, therefore, the trespass claim, the case must be remanded to the district court to allow appropriate "tailoring" of the injunction to the trespass claim. Project Rescue further claims that, after *Bray*, the section 40-c claim no longer states a claim upon which relief can be granted and, therefore, that the injunction is improper. We decline to address the merits of any of these contentions for the reasons that follow.

In the district court, Project Rescue sought the vacatur of the preliminary injunction on the ground that the sole federal claim should be dismissed, that the pendent state law claims should then also be dismissed because the exercise of pendent jurisdiction would be improper after dismissal of the federal claim, and that, with no claim remaining in the case, the injunction should be vacated. Project Rescue did not, however, **[368]** assert in the alternative that the district court should modify the injunction to reduce the contempt fines or to limit it to the trespass claim alone, or that the court should dismiss the section 40-c claim for failure to state a claim. Project Rescue thus gave the district court no reason to consider, in the course of making its decision on the motion to vacate, the claims that it now asserts. In our view, the district court should have the first opportunity to determine, on proper application of the parties, both whether the injunction exceeds its state law basis and whether, if so, other state law or federal law bases exist for this injunction. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994). Accordingly, we do not address Project Rescue's state law challenges to the injunction and do not disturb, on any of those grounds, the district court's refusal to vacate the injunction.

B. *Constitutional Limits on Injunction*

1. *First Amendment*

[5] Project Rescue's next claim regarding the scope of the injunction is that certain provisions infringe on its First Amendment right to freedom of speech.[5] For the reasons stated below, we conclude that, with two exceptions, the provisions of the preliminary injunction comply with the First Amendment.

Pro-Choice properly acknowledges that the challenged provisions of the preliminary injunction reach both expressive conduct, such as demonstrating and picketing, and speech that the First Amendment protects. *See Frisby*, 487 U.S. at 479, 108 S.Ct. at 2499 (ordinance that prohibits picketing on an issue of public concern "operates at the core of the First Amendment");

---

5 As part of its First Amendment challenge to the preliminary injunction, Project Rescue contends that the injunction constitutes a prior restraint and that, as such, it is presumptively unconstitutional. The Supreme Court recently disposed of this argument, holding that a content neutral injunction that restricts, but does not absolutely bar, particular expression is not a prior restraint. *See Madsen*, ___ U.S. at ___ n.2, 114 S.Ct. at 2524 n.2 (citing *Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) (per curiam); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)). Because, as discussed below, the injunction in this case is content neutral and is not an absolute bar on particular expression, it is not an invalid prior restraint.

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981) (oral and written expressions of religious views fall within protection of First Amendment); *see also Pro-Choice I*, 799 F.Supp. at 1432 ("[t]here is no question that defendants' activities constitute a form of political speech protected by the First Amendment"). Moreover, the injunction reaches constitutionally protected expression in a traditional public forum: public sidewalks. *Frisby*, 487 U.S. at 480, 108 S.Ct. at 2500; *United States v. Grace*, 461 U.S. 171, 177-80, 103 S.Ct. 1702, 1706-09, 75 L.Ed.2d 736 (1985); *Heffron*, 452 U.S. at 651, 101 S.Ct. at 2565-66; *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990); *see also Pro-Choice I*, 799 F.Supp. at 1432.

[6] Crucial to our review of the constitutionality of the preliminary injunction is the determination whether it is content based or content neutral, that is, whether it is justified with or without references to the content of the regulated expression. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82, 384-86, 112 S.Ct. 2538, 2542, 2544, 120 L.Ed.2d 305 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-54, 105 L.Ed.2d 661 (1989). In making this determination, "we ... look to the government's purpose as the threshold consideration." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2523.

[7] Contrary to Project Rescue's contention, the injunction is not properly considered content based merely because it applies to abortion opponents and not to abortion rights supporters. The Supreme Court recently stated that the fact "[t]hat petitioners all share the same view point regarding abortion does not in itself demonstrate that some invidious content-or viewpoint-based purpose motivated the issuance of the

[injunctive] order." *Id.* (emphasis added); *see also* [369] *New York State Nat'l Org. for Women*, 886 F.2d at 1363. Rather, the injunction was imposed on Project Rescue because it was creating the threat of irreparable injury to women seeking abortions. *See Pro-Choice I*, 799 F.Supp. at 1428; *see also Madsen*, ___ U.S. at ___, 114 S.Ct. at 2523.

[8] Our inquiry into whether the injunction in this case is content based or content neutral does not end here, however, because we must still determine whether the justifications underlying the issuance of the injunction refer to the content of the restricted expression. *See R.A.V.*, 505 U.S. at 384-86, 112 S.Ct. at 2544; *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753-54. One justification cited by the district court was that women seeking services at the plaintiff facilities would be denied unimpeded access to those services in the absence of a preliminary injunction restraining Project Rescue's activities. *Pro-Choice I*, 799 F.Supp. at 1428. The district court also justified the injunction on the ground that, without an injunction, prospective patients at the facilities, as well as staff members would suffer adverse effects, especially stress and anxiety, from Project Rescue's activities, causing an increase in the risks associated with the abortion procedure. *Id.* Because the purpose of ensuring access to services at the facilities does not refer to the content of the restricted expression and, therefore, constitutes a valid basis for the injunction, we need not determine whether the purpose of avoiding stress and anxiety to patients is itself content based.

[9] We note, however, that a government regulation of expression is considered content based if it seeks to prevent the listeners of that expression from being offended by the message. *See Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988). On the other hand, a government

regulation of expression would probably be considered content neutral if its purpose is to avoid a violent audience reaction to the message. *See Texas v. Johnson*, 491 U.S. 397, 407 n.4, 109 S.Ct. 2533, 2541 n.4, 105 L.Ed.2d 342 (1989). To the extent that, in this case, an injunction's purpose of avoiding stress to prospective clinic patients is closer to avoiding offense, *see Boos*, 485 U.S. at 321, 108 S.Ct. at 1163-64, than to avoiding violence, *see Johnson*, 491 U.S. at 407 n.4, 109 S.Ct. at 2541 n.4, that purpose might constitute a justification that impermissibly refers to content. We do not decide this issue, however, because the injunction here is validly based on the content neutral purpose of ensuring access to services at facilities where abortions are performed.

We now proceed to apply the Supreme Court's newly enunciated test for determining the constitutionality of content neutral injunctions restricting expression in a public forum: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525. As explained by the Court, this new test is more rigorous than the traditional test that has been applied to regulations of the time, place and manner of expression. *See, e.g., Clark*, 468 U.S. at 293, 104 S.Ct. at 3069 (holding that test for time, place and manner restrictions is whether the restriction is content neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication). More searching scrutiny of content neutral injunctions restricting expression, as opposed to content neutral legislation restricting expression, is appropriate because of the "greater risks of censorship and discriminatory application" associated with injunctions and the "'effective practical guaranty against arbitrary and unreasonable government'" inherent in legislation that is to be generally applied. *Madsen*, ___ U.S. at ___, 114 S.Ct. at

2524 (quoting *Railway Express Agency v. New York*, 336 U.S. 106, 112-13, 69 S.Ct. 463, 466-67, 93 L.Ed. 533 (1949)).

[10] In applying the *Madsen* test, we first analyze whether the government interests identified by the district court--safe performance of abortions, public safety, and protection of one group's constitutional rights without sacrificing another group's constitutional rights--are significant. We conclude that they are. As the Court recognized in *Madsen*, the government has strong interests both "in ensuring the public safety and order" and "in protecting a woman's freedom [370] to seek lawful medical or counseling services in connection with her pregnancy." *Id.* at ___, 114 S.Ct. at 2526. Moreover, it is axiomatic that the government has a significant interest in protecting the constitutional rights of all persons and groups. Accordingly, the government interests identified by the district court are "quite sufficient to justify an appropriately tailored injunction to protect them." *Id.*

[11] We now examine each of the challenged provisions of the injunction to determine whether, under the *Madsen* test, it passes First Amendment muster. First, Project Rescue challenges the establishment, in paragraph 1(b) of the injunction, of a fifteen foot "bubble zone" around facilities in the Western District of New York at which abortions are performed. The bubble zone provision prohibits all demonstrations within fifteen feet of such facilities' doorways, doorway entrances, driveways, driveway entrances, and parking lot entrances; it also prohibits any demonstrations within fifteen feet of any person or vehicle seeking access to the clinics. The injunction allows two demonstrators, however, to enter the bubble zone for the exclusive purpose of engaging in sidewalk counseling, which is characterized as a non-threatening conversation with a

prospective clinic patient seeking to persuade the patient not to have an abortion.

In determining whether the bubble zone provision "burden[s] no more speech than necessary," *id.* at ___, 114 S.Ct. at 2525, to serve the identified significant government interests, we note first that the bubble zone does not effect a complete ban on all expression within the zone; rather, the injunction permits a limited exception for two persons at a time to enter the bubble zone for the purpose of engaging in sidewalk counseling, until such time as the person being counseled indicates a desire that the counseling cease. Moreover, the radius of the bubble zone is the relatively short distance of fifteen feet. *Cf. id.* at ___, 114 S.Ct. at 2527 (upholding thirty-six foot bubble zone around abortion clinic property).

On the other hand, we must recognize that the bubble zone constitutes a substantial restriction on Project Rescue's activities. Because other provisions of the injunction restrain Project Rescue from obstructing or in any way impeding access to the clinics, parking lots and driveways, the bubble zone provision apparently forbids conduct even beyond that which would obstruct or impede access. For example, as we read the injunction, the bubble zone provision prohibits a defendant from standing on a sidewalk in front of the clinic, within fifteen feet of the entrance, holding a sign imprinted with an antiabortion message.

Moreover, the need for this prohibition, which goes beyond preventing the obstruction of access, is not established on this record. As noted by the district court, Project Rescue complied with the TRO by refraining from engaging in physical blockades of the clinics. Although approximately six individuals were held in civil contempt for violating the TRO by engaging in such conduct as impeding and hindering access to the facilities

or upsetting prospective patients, *see Pro-Choice III*, 994 F.2d at 992-93, it appears from the record that, of these individuals, only some had engaged in obstructive activities. Without more evidence of Project Rescue's disregard for the court's order to refrain from obstructing or impeding access, we are reluctant to approve a restriction of First Amendment rights such as that effected by the bubble zone provision.[6]

The Supreme Court's analysis of the thirty-six foot buffer zone at issue in *Madsen* provides an instructive contrast. There, an injunction established an absolute ban on "congregating, picketing, patrolling, demonstrating or entering" any property within thirty-six feet of the clinic's property line. The Court noted that "[t]he state court [that issued the injunction] was convinced that allowing the petitioners to remain on the clinic's [371] sidewalk and driveway was not a viable option in view of the failure of the first [less restrictive] injunction to protect access." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2527 (emphasis added). The Court further stated that "[w]e ... bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic." *Id.* (emphasis added). Here, by contrast, there is no indication that the TRO violations were so pervasive as to undermine the district court's general goal of ensuring access to abortion facilities.

---

[6] Although Pro-Choice has brought to our attention several instances of violations of the preliminary injunction, resulting in criminal contempt convictions, we note that such evidence is outside the record to which we may look for support for the preliminary injunction. The district court could, however, consider such evidence now in response to any motion the parties might make regarding the current scope of the injunction's prohibitions.

We conclude here that, unless and until the record supports a finding that he prohibition against obstructing or impeding access to the facilities is ineffective to protect access, the bubble zone provision does not pass constitutional muster. Accordingly, the bubble zone provision imposed in paragraph 1(b) of the injunction sweeps to broadly and burdens more of Project Rescue's constitutionally protected expression than is necessary to protect the government's significant interests in the safe performance of abortions, in public safety and in protecting all persons' constitutional rights. Our holding is limited, however, to the factual record before us; a different record revealing greater intransigence by Project Rescue might well support a more restrictive injunction, as in *Madsen*.

[12] Project Rescue also challenges the so-called cease and desist requirement imposed in paragraph 1(c). That provision states that "no one is required to accept or listen to sidewalk counseling, and ... if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling." Although we approved a nearly identical restriction in *New York State Nat'l Org. for Women*, 886 F.2d at 1363-64, we must revisit this issue in light of the Supreme Court's intervening decision in *Madsen*.

The *Madsen* Court struck down a provision in the injunction at issue there that required the defendants, when located within 300 feet of the abortion clinic, to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate.'" ___ U.S. at ___, 114 S.Ct. at 2529 (quoting injunction). Treating this "no approach" provision as implicating expressive activities

protected by the First Amendment, *cf. id.* at ___-___, 114 S.Ct. at 2532-33 (Stevens, J., concurring in part and dissenting in part) (sidewalk counseling is a mixture of conduct and expression), the Court held that "it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at ___, 114 S.Ct. 2529.

The cease and desist provision challenged here is somewhat less restrictive than the no approach provision in *Madsen* because it does not completely prohibit sidewalk counselors from initiating contact with persons entering the clinics. This distinction is not dispositive, however, because both the cease and desist provision here and the no approach provision in *Madsen* operate to allow the prospective counselee to control the prospective counselor's opportunity to engage in protected expression.[7] The provisions are thus equally restrictive of the communication offered by the counselors; both effectively condition the demonstrator's right to engage in protected expression on another person's wish to hear such expression. Although the prospective counselee need not listen to the counselor, she does not have the right to stop the counselor's communication, absent any evidence that the communication is independently proscribable, *see id.*, or that the counselor is engaging in pure conduct that is not protected by the First Amendment. *Cf. id.* at ___, 114 S.Ct. at 2533 (Stevens, J., concurring in part and dissenting in part). Like the no approach provision [372] in *Madsen*, the cease and desist provision at issue here thus violates the established principle that

---

[7] As noted above, Pro-Choice has not disputed that sidewalk counseling is expressive activity entitled to full First Amendment protection.

"in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Boos*, 485 U.S. at 322, 108 S.Ct. at 1164 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988)). Accordingly, we conclude that the cease and desist provision in paragraph 1(c) burdens more speech than necessary to serve the identified government interests.

—

[13] Project Rescue next challenges the prohibition in paragraph 1(e) against "inducing, directing aiding, or abetting in any manner, others to take any of the [enjoined] actions." Project Rescue contends that this provision violates the First Amendment's protection of free speech because it reaches beyond expression that is likely to produce "imminent lawless action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28, 102 S.Ct. 3409, 3433, 73 L.Ed.2d 1215 (1982). We are not persuaded.

This contention confuses the inquiry as to whether certain speech is entitled to First Amendment protection, the issue raised in *Claiborne Hardware*, with the inquiry as to whether constitutionally protected speech may permissibly be restricted. Indeed, assuming that the challenged restrictions in paragraph 1(e) reach constitutionally protected expression, we must still determine whether the injunction's regulation of that protected expression is justified under the circumstances presented. Because it could not be invalid to prohibit the inducement, direction, aiding or abetting of protected expression that is itself validly prohibited, we conclude that the restriction in paragraph 1(e) as it applies to the valid provisions of the injunction is justified.

[14] Finally, Project Rescue challenges the injunction's requirement that it make a "good faith effort to instruct all

organizations and individuals [it] believes to be planning to participate in any of the [enjoined] activities ... not to engage or participate in [those] activities." Project Rescue contends that this provision is invalid because it forces Project Rescue to engage in speech repugnant to its views. We disagree. Our decision in *New York State Nat'l Org. for Women*, 886 F.2d at 1352, is dispositive of this contention. There, we held that a leader of an antiabortion group could properly be held in contempt for "fail[ing] to instruct his followers that the TRO prohibited their goal of blocking entry to facilities providing abortion services." *Id.* In accordance with that holding, we reject Project Rescue's challenge to the "good faith effort" provision as that provision applies to the valid provisions of the injunction.

2. *Due Process*

Project Rescue further contends that certain provisions of the injunction are impermissible vague. We disagree.

[15][16] "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). Although most void-for-vagueness challenges target municipal ordinances, criminal statutes and other generally applicable laws, *see, e.g., Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (criminal statute); *Village of Hoffman Estates v. The Flipside, Hoffman Estates*, 455 U.S. 489, 491, 102 S.Ct. 1186, 1190, 71 L.Ed.2d 362 (1982) (village ordinance); *United States v. Sun and Sand Imports*, 725 F.2d 184, 186-87 (2d Cir. 1984) (federal regulation), Project Rescue's vagueness challenge to the injunction is nonetheless proper because an unclear injunction, like unclear legislation, "may trap

the innocent by not providing fair warning" of what is prohibited. *See Grayned*, 408 U.S. at 108, 92 S.Ct. at 2299. Moreover, injunctions pose a particular risk of discriminatory application, *see Madsen*, ___ U.S. at ___, 114 S.Ct. at 2524, and that risk constitutes yet another reason to require clear and definite notice of what is prohibited. *See Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298-99.

[17][18][19] A regulation is void for vagueness if it is so indefinite that ordinary people cannot understand that which it prohibits. **[373]** See *Kolender*, 461 U.S. at 357, 103 S.Ct. at 1858. Moreover, if the regulation does not include minimal guidelines to govern its enforcement, it is impermissibly vague. *Id.* at 358, 103 S.Ct. at 1858. Finally, if an injunction implicates fundamental rights, the reviewing court must insist on strict compliance with the requirement of clarity. *Cf. Village of Hoffman Estates* 455 U.S. at 498, 102 S.Ct. at 1193 ("[t]he degree of vagueness that the Constitution tolerates ... depends in part on the nature of the enactment," and economic regulations are subject to more lenient vagueness test).

[20] First, Project Rescue contends that the prohibitions on "touching" and "crowding" in paragraph 1(c) are unconstitutionally vague. The word "touching" is, however, sufficiently clear to allow ordinary persons to understand what is prohibited. Moreover, although the meaning of the word "crowding" is somewhat less clear than the meaning of "touching," we believe that, in the context of paragraph 1(c)'s other prohibitions, the "crowding" restriction is not impermissibly vague.

[21] Project Rescue also cites the prohibition on "excessively loud sound[s]" in paragraph 1(d) as vague. This provision, however, is accompanied by a definitional clause that

makes clear that an "excessively loud sound" is one that "injures, disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed." The noise restriction, therefore, is valid.

[22] Project Rescue further asserts that the injunction is vague because it is impossible for Project Rescue to identify the clinic staff and patients who are protected under the terms of the injunction. Project Rescue need not, however, identify those persons who are clinic staff members or patients in order to bring its activities into compliance with the injunction. Paragraphs 1(b) and 1(c) refer only to "any person ... seeking access to or leaving such facilities." (emphasis added). Moreover, paragraph 1(d) prohibits noises that injure, disturb or endanger the health or safety of "any patient or employee of a health care facility at which abortions are performed." This provision does not require Project Rescue to identify individual patients or employees and then to make a particularized assessment regarding the noise level that is permissible as to that person. Rather, Project Rescue must keep its noise levels low enough that they do not injure, disturb or endanger the health of all patients and staff members inside or outside the facilities. Accordingly, these provisions are also sufficiently definite to defeat Project Rescue's vagueness challenge.[8]

---

[8] Project Rescue also presents an "overbreadth" challenge to paragraphs 1(b), 1(c) and 1(d) of the injunction. Project Rescue asserts that these provisions are "overbroad" because they are not narrowly tailored. We view this argument as referring to the traditional test for time, place and manner restrictions on expression, the test that was recently replaced by a more stringent test for content neutral injunctions restricting expression. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525. Because we have applied the new *Madsen* test here, we do not specifically address Project Rescue's overbreadth challenge.

C. *Other Challenges*

[23] Project Rescue also contends that the injunction's prohibition against trespassing on the facilities' parking lots, parking lot entrances, driveways and driveway entrances is redundant and unnecessary because state trespass laws reach such conduct. This contention is essentially an objection to the district court's determination that women seeking abortions will be denied access to the plaintiff facilities if an injunction prohibiting such trespasses does not issue. Project Rescue has, however, given us no reason to believe that the district court's determination was erroneous. Indeed, the determination is supported by facts in the record, facts that are themselves not challenged by Project Rescue. For example, the district court found that the defendants often congregate at or near the driveway entrances and that they thereby succeed in impeding access to the clinics. *Pro-Choice I*, 799 F.Supp. at 1424. Moreover, the court found a threat of continuing trespasses. *Id.* at 1432. Project Rescue's contention therefore fails.

[24] Finally, Project Rescue contends that private property owners, such as the [374] plaintiff facilities, cannot properly assume regulatory control over government property. While this proposition is undoubtedly true, it is inapposite here, where the district court, not the plaintiff facilities, issued the injunction restricting Project Rescue's activities on public property.

IV. *Summary*

To summarize, we uphold all challenged portions of the preliminary injunction except (1) the provision in paragraph 1(b) prohibiting "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking

lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities," and (2) the provision in paragraph 1(c) providing that "no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling." We strike down those two provisions as unconstitutional because they burden more speech than necessary to serve the identified significant government interests.

Conclusion

In *Pro-Choice I*, we affirm in part and reverse in part the order issuing the injunction. In *Pro-Choice II*, which does not involve the First Amendment issues, we affirm the order denying the motion to vacate the injunction.

OAKES, Senior Circuit Judge, (dissenting):

While I agree with the greater part of the majority's ruling, I disagree as to two points: I believe that both the fifteen-foot "bubble zone" and the cease and desist order are necessary under the circumstances of this case to ensure the health and safety of the patients receiving abortions at the clinics. Both provisions further the significant government interest in the safe performance of abortions, and in light of the past behavior of the Project Rescue protesters, the provisions burden no more speech than necessary, and, consequently, do not violate the First Amendment. I will address each provision separately.

I. *The Bubble Zone*

Madsen v. Women's Health Ctr., Inc., ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) requires that the injunction "burden no more speech than necessary to serve a significant government interest." *Id.* at ___, 114 S.Ct. at 2519. I agree with the majority that all three of the government interests identified by the district court are indeed significant: 1) the safe performance of abortions, 2) public safety, and 3) protection of one group's constitutional rights without sacrificing another group's constitutional rights. *See ante* pp. 141-42. The question, therefore, is whether the so-called bubble zone burdens more speech than necessary to serve those interests. The majority concludes that it does, based, first, on the fact that other provisions of the injunction restrain Project Rescue from obstructing or impeding access to the clinics, parking lots and driveways, *ante* p. 142, and, second, on its conclusion that the record does not reflect a need to impose restrictions beyond those other provisions. *Ante* p. 143.

In my view, although the other provisions in the injunction do much to promote free access to abortions, they fall short of what is required to ensure that abortions are safely performed at facilities in the Western District of New York. At least we must accord the district court's findings and conclusions to that effect much weight. There is ample evidence in the record of the health risks faced by women who are targets of the "sidewalk counseling" and other Project Rescue demonstrations. After an extensive evidentiary hearing the district court found that in addition to physically blocking access to the clinic, "[t]he demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner ... This activity causes stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupts the [375]

atmosphere necessary for rendering safe and efficacious health care." *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1424 (W.D.N.Y. 1992); *see also ante* p. 136. The district court also found that women who suffer from stress and anxiety caused by confrontations with the protesters run an increased risk of complications associated with abortions. *Pro-Choice Network*, 799 F.Supp. at 1427; *see also ante* p. 136.

These health risks are caused by actions of the protesters that go far beyond the physical barricading of the clinic entrances, parking lots and driveways. The bubble zone would prevent the protesters from harassing patients at a physically close range and from swarming around patients in large groups as they approach the clinic. Face-to-face confrontation such as this presents a risk of duress that is "an appropriate target of regulation." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. ___, ___, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541 (1992).

The district court determined that the fifteen-foot bubble zone was necessary to ensure that abortions performed at the clinic are without undue health risks to the patients. "[S]ome deference must be given to the [district] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2549.

The majority suggests that even if the district court believed that the bubble zone was warranted to further significant government interests, it should first have imposed a narrower injunction without a bubble zone to determine whether a less restrictive solution would be sufficient. *Ante* p. 143. This iterative process seems to me unwise and not required by

Madsen. The *Madsen* Court examined the facts present in that case in order to determine whether the buffer zone was necessary. *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526-27. One factor in the Court's analysis was that a less restrictive injunction had proved ineffective. *Id.* The Court did not state or even imply that this factor need be present in order for a buffer zone or its equivalent to be a necessary remedy. Requiring the district court to impose a less restrictive injunction than the one the court found necessary is inefficient and perhaps dangerous. While the district court waits for the injunction to prove ineffective, patients may well continue to suffer the extreme stress and anxiety that causes the increased health risks associated with abortions.

In the case before us, the past actions of the protesters justify the imposition of the bubble zone. At least six of the defendants violated the temporary restraining order imposed by the district court. *Ante* p. 143. Further, many of the sidewalk counselors and other defendants were arrested for harassment on more than one occasion, yet they continued to harass and intimidate patients, patient escorts and clinic staff. *Pro-Choice Network*, 799 F.Supp. at 1425.

The bubble zone would burden the least speech necessary to further the goal of ensuring the safe performance of abortions. The bubble zone is much less restrictive than the buffer zone upheld in *Madsen*. The bubble zone prohibits the protesters from demonstrating within fifteen feet of clinic entrances and driveways, or within fifteen feet of persons entering a clinic, as compared with the buffer zone in *Madsen* which extended thirty-six feet from clinic property. In addition, unlike the buffer zone in *Madsen*, the bubble zone does not prevent the protesters from expressing their views inside the fifteen-foot radius. Importantly, two representatives of the demonstrators are

allowed to enter the zone to "counsel" patients. The small size of the zone ensures that the patients, patient escorts and clinic staff inside the zone will hear anything said by the demonstrators at the edge of the zone and see any signs or pictures displayed by the demonstrators. *Cf. Madsen*, ___ U.S. at ___, 114 S.Ct. at 2549 ("Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots"). Hence, the district court carefully designed the zone to allow Project Rescue effectively to communicate its views to the patients and staff of the clinic while ensuring [376] that the patients are not so overwhelmed as to jeopardize their well-being. I would, therefore, uphold that portion of the injunction.

II. *The Cease and Desist Order*

The Court in *Madsen* struck down a provision that prohibited demonstrators from approaching patients within 300 feet of the clinic unless the patients affirmatively requested to communicate with the demonstrators. *Id.* at ___-___, 114 S.Ct. at 2528-30. The cease and desist provision in this case is much less restrictive than that "no approach" provision. The cease and desist order provides that if a patient does not want to be counseled, the protesters must cease their attempts at counseling that person. This provision allows people who are the targets of focused counseling efforts by the protesters to walk away from the counseling. The purpose of the provision, like that of the bubble zone, is to reduce the potentially harmful stress and anxiety experienced by the patients who are forced to pass through the demonstrators in order to avail themselves of clinic services.

In striking down this provision, the majority relies on a proposition articulated by the Court in *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988)

(quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988)), that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Ante* p. 144 (internal quotation marks omitted). In *Boos*, the statute at issue prohibited any person from displaying a sign outside an embassy that tended to bring the foreign government into "public odium." *Boos*, 485 U.S. at 316, 108 S.Ct. at 1161. In striking down the statute, the Court held that foreign diplomats would have to suffer those indignities. *Id.* at 329, 108 S.Ct. at 1168. The *Hustler* case involved a libel claim by a minister over a parody in a magazine. *Hustler*, 485 U.S. at 48, 108 S.Ct. at 878. The Court held, similarly, that even "outrageous" caricatures must be tolerated in the interest of freedom of expression. *Id.* at 55, 108 S.Ct. at 881-82.

This case involves countervailing concerns not present in *Boos* or *Hustler*. Focused picketing is fundamentally different from generally disseminated communication that cannot be banned from public places. *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2527 (citing *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). This case is analogous to *Frisby*, in which the Court upheld an ordinance that prohibited picketing in front of or around an individual residence. *Id.* at 488, 108 S.Ct. at 2504. The Court reasoned that people are captive audiences inside their homes, and in the interest of residential privacy, the Court allowed the ban on picketing. *Id.*; *cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 94 S.Ct. 2714, 2718, 41 L.Ed.2d 770 (1974) (upholding regulation of advertisement on mass transit because riders were captive audience); *Cameron v. Johnson*, 390 U.S. 611, 622, 88 S.Ct. 1335, 1341, 20 L.Ed.2d 182 (1968) (upholding statute prohibiting picketers from blocking entrance to and egress from courthouse). Women who want

abortions have no choice but to brave the demonstrations en route to the clinics. They are, in effect, a captive audience to the messages of the protesters.

The cease and desist provision burdens no more speech than necessary. The provision does not prevent the protesters from expressing their views. They can approach and attempt to counsel patients, escorts and staff. The provision only prevents the protesters from persistently badgering people at a close range. The protesters would still be able to communicate their views to the patients, escorts and staff, who would still be forced to hear and see the protest, no matter how insulting or offensive.

III. *Conclusion*

Because I believe both the bubble zone and the cease and desist order are necessary for the injunction to fully effectuate its goals, I [377] would uphold those portions of the injunction.

APPENDIX C

PRO-CHOICE NETWORK OF WESTERN NEW YORK, Buffalo GYN Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, and Alexander Women's Group,

Plaintiffs-Appellees,

v.

Nancy WALKER, Defendant-Appellant, Project Rescue Western New York, Operation Rescue, Project Life of Rochester, Rev. James L. Evans, Rev. Paul Schneck, Rev. Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Rev. Daniel Hamlin, James Handyside, Pamela Huffnagle, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmilller, Jr., Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Does, Jane Does, the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, Buffalo GYN Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortmann, M.D., Highland Obstetrical Group, and Alexander Women's Group,

Plaintiffs-Appellees,

v.

Bonnie BEHN and Carla RAINERO,

Defendants-Appellants,

Project Rescue Western New York, Operation Rescue, Project Life of Rochester, Paul Schenk, James L. Evans, Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Daniel Hamlin, Donna Johanns, James Handyside, Pamela Huffnagle, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Does, Jane Does, the last two being fictitious names, the real names of said defendants being presently unknown to palintiffs, said fictitious names being intended to designate orgnaizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.

Nos. 692, 691, Dockets 92-7854, 92-7954.

Untied States Court of Appeals,
Second Circuit.

Argued Dec. 15, 1992.

Decided May 26, 1993.

[990][1] James J. Duane, Virginia Beach, VA, for appellants.

Lucinda M. Finley, Buffalo, NY, for appellees.

Before: MESKILL, Chief Judge, NEWMAN and JACOBS, Circuit Judges.

MESKILL, Chief Judge:

These two appeals involve contempt judgments resulting from violations of the same Temporary Restraining Order (TRO) issued by Judge Arcara on September 27, 1990. We address both appeals together because of their factual similarity and identical legal issues.

Appellant Nancy Walker appeals a judgment of the United States District Court for the Western District of New York, Arcara, J., entered on July 28, 1992 which granted

[1] Bracketed numbers in bold type indicate page numbers from decision reported at 994 F.2d 989 (2d Cir. 1993).

the plaintiffs-appellees' (Pro-Choice Network's)[1] petition for civil contempt against her and imposed $10,000 in civil damages and a $20,000 fine. The court directed the Clerk to enter judgment against Walker in the amount of $10,000 to be paid to two of the plaintiffs; the remaining $20,000 was made contingent upon any future violations of the preliminary injunction.

Appellants Bonnie Behn and Carla Rainero appeal a judgment of the same court entered on August 14, 1992 which granted Pro-Choice Network's petition for civil contempt against them, entered judgment against them in the amount of $10,000 each and granted Pro-Choice Network's request for reasonable attorney's fees and costs associated with prosecuting the contempt.

Although the district judge labeled the contempt proceedings civil, appellants argue that the unconditional fines he imposed are immediately appealable as orders of criminal contempt because they were neither compensatory nor coercive. They also contend that, as to each of them, the district court's findings of civil contempt by clear and convincing evidence were clearly erroneous. Walker **[991]** also argues that the portions of the TRO she allegedly violated were not legally valid because

[1] Plaintiffs-appellees are Pro-Choice Network of Western New York, Buffalo GYN Womenservices P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, and Alexander Women's Group. Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York which is dedicated to maintianing legal and safe access to family planning and abortion services in the Western New York area. The remainder of the appellees are health care providers from the Western New York area. For convenience, we will refer to the appellees as Pro-Choice Network.

her alleged acts of contempt did not create any genuine threat of irreparable injury. Behn and Rainero argue that the portion of the order they allegedly violated was not legally valid because the mere act of speaking to unwilling listeners does not create any legally actionable threat of irreparable injury. Futhermore, Behn and Rainero contend that their conduct was protected under the First Amendment and therefore was not a violation of the court's order. Finally, all appellants argue that, even if we uphold the district court's finding of civil contempt, we should vacate the amount and disposition of the sanctions.

Under our decisions in *New York State Nat'l Org. For Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989) (*Terry I*), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990), and *New York State Nat'l Org. For Women v. Terry*, 961 F.2d 390 (2d Cir. 1992) (*Terry II*), *vacated sub nom. Pearson v. Planned Parenthood*, ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993),[2] the sanctions the district court imposed on each of the appellants are clearly ones for civil, not criminal, contempt. Therefore, we are without jurisdiction to hear these appeals. Because we lack jurisdiction, we cannot consider the merits of any of appellants' other arguments including their alternative contention that we should vacate the amount and disposition of the sanctions.

---

2 On February 22, 1993, the Supreme Court vacated our judgment in *Terry II* and remanded the case to us for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). *Bray* was decided after we heard oral argument in the appeals at bar and does not involve any of the issues of civil and criminal contempt we address in these appeals. Therefore, we rely on our reasoning in *Terry II* concerning the issue of contempt because we do not believe it is implicated by the Supreme Court's vacation of the *Terry II* judgment.

BACKGROUND

Pro-Choice Network commenced an action in the district court on September 24, 1990 alleging that the defendants[3] had been engaging in a consistent pattern of illegal conduct at the appellees' health care facilities including blocking access to and egress from their facilities, trespassing, and harassing and intimidating their staffs and patients. The complaint stated causes of action under 42 U.S.C. § 1985(3) as well as under several state laws.

Immediately upon filing its complaint, Pro-Choice Network moved for a TRO to enjoin a blockade that defendants had announced for September 28, 1990. After conducting a hearing and hearing argument on the motion, the district court issued a TRO on September 27, 1990 enjoining appellants from conducting any blockade of the appellees abortion facilities and from harassing patients and staff entering or exiting these

---

3 The defendants include three organizations, Project Rescue Eastern New York, Operation Rescue and Project Life of Rochester, and fifty individuals, including the three appellants before us. They are opposed to abortion and dedicated to the "pro-life" movement.

facilties.[4] Although the defendants held a demonstration on September 28, 1990, they complied with the terms of the TRO. After having previously extended the TRO several times, on November 2, 1990, with the consent of the appellants, the district court ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided. The court granted the preliminary injunction on February 14, 1992. *Pro-choice Network v. Project Rescue*, 799 F.Supp. 1417 (W.D.N.Y. 1992). Only two of the defendants appealed the prelminary

---

[4] The TRO stated in pertinent part: ORDERED THAT Defendants ... are: 1. Temporarily enjoined and restrained in any manner or by any means from: (a) trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities, except that sidewalk counseling by no more than two persons as specified in paragraph (b) shall be allowed; (b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed; Provided, however, that sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person.

injunction; none of the appellants now before us was part of that appeal.[5]

. . . . .

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of a health care facility where abortions are performed in the Western District of New York, nor shall any person make such sounds which interferes [sic] with the rights of anyone not in violation of this Order; (d) attempting, or inducing, encouraging, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a), (b) and (c) above.

Nancy Walker

On December 6 and December 14, 1990, Pro-Choice Network filed motions for contempt against Walker based on incidents on November 29, 1990 outside Dr. Paul Davis' office and on December 1 and December 8, 1990 outside the premises of the Buffalo GYN Womenservices. In the words of the district

---

[5] By consent of the parties to that appeal, the appeal of the preliminary injunction was withdrawn without prejudice to its being renewed pending resolution of the related United States Supreme Court case of *Bray v. Alexandria Women's Health Clinic*. The Supreme Court's decision in *Bray* was issued on January 23, 1993. *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). The appeal of the preliminary injunction was reinstated on February 1, 1993. On March 24, 1993, the parties stipulated to the withdrawal of the appeal without prejudice to its being renewed within twenty days after the district court's decision of a pending motion to dismiss in the underlying civil action.

court, Pro-Choice Network sought "compensatory and coercive civil contempt sanctions to remedy the loss they suffered as a result of the alleged violations, and to coerce Walker into conforming her behavior to the terms of the TRO in the future." The court held evidentiary hearings on these charges over the course of several days between February 6 and February 14, 1991. On July 24, 1992, Judge Arcara issued a decision and order finding Walker in contempt based on the two incidents which occurred on November 29, 1990 and December 1, 1990. the following facts are taken from the district court's opinion.

On November 29, 1990, Walker was part of a demonstration outside a health care facility that performs abortions in Amherst, New York. She repeatedly attempted to "counsel" three people, one of whom had an appointment with a doctor at the facility. The district court found that "[c]onfronted with Walker's loud and invasive behavior, [the three] repeatedly asked Walker to leave them alone." Walker ignored the requests and, according to the district court, her conduct "impeded and hindered" the access of these three people to the clinic.

On December 1, 1990, Walker was located outside the Buffalo GYN Womenservices' clinic as part of a demonstration offering "sidewalk counseling" to women entering the clinic. She approached two women who were seeking access to the clinic. The district court found that she pursued these two women for an entire city block, harassing them all the while. The court stated, "[s]he yelled at them, crowded them, invaded their personal space, and impeded and hindered them from entering the clinic."

The district court found that the collateral bar rule precluded Walker from challenging the validity of the TRO as a defense against the imposition of contempt sanctions. After

discussing the standard for holding someone in civil contempt, the district court concluded that Walker was in civil contempt of the TRO on November 29 and on December 1, 1990. The court found that the TRO was clear and unambiguous and that the proof of noncompliance was clear and convincing. The court further found that Walker was not reasonably diligent and energetic in attempting to achieve compliance with the TRO and that her violation was willful.

The TRO provides that failure to comply with it will subject the contemnor to civil damages of $10,000 per day for the first violation and to a civil contempt fine double that of the previous fines for successive violations. [993][6] The district court ordered Walker to pay an "immediate" sanction of $10,000 to be divided evenly between Dr. Davis and Buffalo GYN Womenservices; the court stated that these plaintiffs had "made an uncontested showing of cognizable injuries to their operations resulting directly from Walker's unlawful conduct." Because Walker had established that she had limited financial resources, the court made payment of the remianing $20,000 contingent on future violations of the preliminary injunction. The court also

---

[6] The TRO specifically provides, in pertinent part:
ORDERED that the failure to comply with this Order by any Project Rescue participant or participant in any of the activities enjoined in paragraphs (a) through (d) above with actual notice of the provisions of this Order shall subject him or her to civil damages of $10,000 per day for the first violation of this Order; and it is further ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fines.

granted Pro-Choice Network's request for reasonable attorney's fees and costs associated with enforcing the TRO.[7]

With respect to the incident that occurred on December 8, 1990, the district court found that Pro-Choice Network had failed to meet its burden of proving Walker's noncompliance by "clear and convincing evidence."

Behn and Rainero

On October 22, 1990, Pro-Choice Network petitioned for civil contempt against Behn and Rainero claiming that on October 20, 1990 Behn and Rainero violated the TRO. The district court held hearings on Pro-Choice Network's petition over the course of several days from June 18, 1991 to July 12, 1991. The court issued a decision and order on August 14, 1992 finding Behn and Rainero in contempt of court based on the events of October 20, 1990. The following facts are taken from the district court's opinion.

On that day, Behn and Rainero were in the vicinity of the Buffalo GYN Womenservices' clinic with, according to the district court, the intent "to dissuade women entering the clinic from obtaining abortions by offering them 'sidewalk counseling.'" Behn and Rainero approached two young men and a young woman who were apparently headed toward the clinic. They began talking to the woman and offering her literature and assistance. After three "pro-choice" escorts came to escort the

---

[7] The TRO also provides for the payment of costs. It states: ORDERED that each contemnor shall be jointly and severally laible for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order.

three to the clinic, Behn and Rainero continued to walk alongside the group. When the young woman began to get upset, the escorts told her there was a TRO in effect and that Behn and Rainero would have to stop talking to her if she asked them. The district court found that the young woman turned to Behn and Rainero and asked them to leave her alone. Despite Behn's and Rainero's testimony to the contrary, the district court also found that it was clear that the young woman was asking both Behn and Rainero to leave her alone. The woman later repeated her request to be left alone.

As it had found previously with Walker, the district court again found that the collateral bar rule precluded Behn and Rainero from challenging the validity of the TRO as a defense, that both Behn and Rainero were in civil contempt of the TRO on October 20, 1990, that the TRO was clear and unambiguous, that the proof of noncompliance was clear and convincing, that Behn and Rainero were not reasonably diligent and energetic in attempting to achieve compliance with the TRO and that their violation was willful.

In accordance with the provisions of the TRO, the district court ordered Behn and Rainero each to pay $10,000 in damages to Buffalo, GYN Womenservices which had "made an uncontested showing of both actual injury, in the form of disrupted daily operations and patients rendered upset and distressed, and compensable loss, consisting of the cost of extra security measures and additional staff." The court also ordered them to pay attorney's fees and costs.

All three appellants now appeal the district court's findings of contempt.

DISCUSSION

[1] We address first our jurisdiction to hear these appeals. All parties to these appeals [994] agree that a party to a pending proceeding may not appeal from an order of civil contempt except as part of an appeal from a final judgment, whereas an adjudication of criminal contempt is a final order appealable prior to final judgment. *See, e.g., United States v. Johnson*, 801 F.2d 597, 599 (2d Cir. 1986). This general rule "prevents interlocutory appeals that fragment the disposition of 'what for practical purposes is a single controversy.'" *Id.* (quoting *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940)).

The demarcation between civil and criminal contempt is well established. *Terry I*, 886 F.2d at 1350. In *Terry I*, we explained:

> The two species of contempt are distinguished by determining the purpose for which a sanction was imposed . . . . A sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party is civil . . . . A sanction imposed to punish for an offense against the public and to vindicate the authority of the court, that is, not to provide private benefits or relief, is criminal in nature.

Id. at 1350-51 (citations omitted).

The district court found that, as to all three appellants, it was "abundantly clear . . . that the present contempt proceedings [were] civil, rather than criminal, in nature." If the district court was correct, we lack jurisdiction to hear these appeals. The district court's labeling of the contempt as "civil"

is a relevant consideration and "there is a 'presumption in favor of finding civil as opposed to criminal contempt where there is some doubt as to the nature of the contempt.'" *United States v. Ayer*, 866 F.2d 571, 573 (2d Cir. 1989) (quoting *United States v. Wendy*, 575 F.2d 1025, 1029 n. 13 (2d Cir. 1978)).

Appellants argue that because the district court's unconditional fines were neither coercive nor compensatory they are immediately appealable as orders of criminal contempt. Appellants contend that contempt sanctions cannot be justified as coercive if the contemnor is not given the opportunity to avoid the sanction after she is first found to have violated the court's order. They argue that the fines at issue here were imposed unconditionally with no chance for appellants to purge themselves of the contempt following their first violation of the district court's order, and that the contempt sanctions are therefore criminal, not civil, in nature. The district court rejected this argument as have we in previous decisions.

In *Terry I*, we upheld contempt sanctions against contemnors who violated a TRO limiting antiabortion protests, rejecting the argument that the district court's failure to provide the defendants with an opportunity to cure or purge themselves of the contempt was a punitive criminal sanction. 886 F.2d at 1350-52. The *Terry I* case was originally commenced in New York State Supreme Court. The state court issued a TRO and subsequently modified it to prohibit the blocking of access to facilities where abortions are performed. *New York Nat'l Org. For Women v. Terry*, 697 F.Supp. 1324, 1326-27 (S.D.N.Y. 1988). The *Terry I* defendants removed the case to federal court on May 3, 1988 after a demonstration was held that day during which several hundred antiabortion protestors were arrested for blocking access at a clinic where abortions are performed. *Id.* at 1328. The May 3, 1988 demonstration did

not lead to any contempt charges. On May 4, 1988, the district judge continued the TRO that the state court previously had entered but modified it. In addition to the previously existing prohibitions, the district judge added coercive sanctions of $25,000 for each day the defendants violated the terms of the order and included a provision that failure to give the city advance notification of the location of any demonstration would make the defendants liable for excess costs incurred by the city due to the lack of notice.

On May 31, 1988 the Terry I plaintiffs moved for civil contempt against the defendants for demonstrations that had occurred on May 5 and 6. The judge granted the motion and imposed $50,000 in civil contempt sanctions to be paid by two of the defendants to the plaintiff National Organization For Women (NOW) and $19,141 to be paid to the city. We held that the sanctions were civil but modified the district court's ruling by **[995]** directing that the sanctions be paid to the court rather than to NOW because NOW had provided no evidence that it had sustained injury as a result of the defendants' activities. *Terry I*, 886 F.2d at 1350-54.

Appellants attempt to distinguish our holding in *Terry I*. They point out that in *Terry I* the district judge modified the TRO to provide for prospective penalties only after he received uncontroverted evidence that the defendants conducted a demonstration on May 3, 1988 in violation of the state court's TRO. *See* 697 F.Supp. at 1330. Appellants argue, therefore, that in *Terry I* the contempt sanctions were civil because even after the defendants first violated the state court's injunction they were given the opportunity to avoid coercive penalties by refraining from any future violations. In support of this argument they rely on the following language in our opinion in *Terry I*:

> The purpose for which the subject sanctions were imposed suggests that they are civil. On May 3, 1988 Operation Rescue conducted a demonstration outside a Queens, New York clinic, ignoring the state court's second TRO, which had been personally served on defendant Terry. As a result, the district court modified the state court's order by including coercive sanctions of $25,000 for each subsequent daily violation of its order. At this point, there is no doubt that the sanctions were entirely conditional and coercive.

Terry I, 886 F.2d at 1351.

Although this quote taken alone arguably supports appellants' contentions, later language in the same paragraph clarifies the basis for our conclusion that the sanctions in that case were ones for civil contempt. We continued:

> [D]efendants were forewarned on May 4 and May 5, 1988 that future violations would result in monetary sanctions. The prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights . . . . Faced on May 5, 1988 with a choice between compliance or noncompliance with the district court's order, defendants chose the latter course. The factual determination of noncompliance--the assessment of whether the standards showing contempt were satisfied--and the resulting imposition of fines necessarily occurred after defendants' ample opportunity to comply had come and gone. Thus, since the sanctions were imposed to compel obedience to a court order they are civil in nature.

Terry I, 886 F.2d at 1351; *see also Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 532-33 (9th Cir. 1991) (relying on *Terry I* to find that sanctions imposed against individuals for their first violation of an injunction against antiabortion demonstrations were civil rather than criminal contempt sanctions).

Furthermore, any attempt by the appellants to distinguish *Terry I* is foreclosed by our subsequent decision in *Terry II*. In *Terry II*, we held, *inter alia*, that several nonparties who previously never had been held in contempt for violating the court's injunction were properly fined $25,000 for their first adjudicated violations. 961 F.2d at 394. In response to appellants' argument in that case that the contempt fines were criminal in nature, rather than civil, we stated: "[W]e ruled to the contrary in *Terry I*. . . . These issues are therefore settled in this circuit, absent reconsideration *in banc* or a different ruling by the Supreme Court." *Id*. at 395 (citation omitted). We are not persuaded by appellants' argument that this holding was based on the fact that persons acting in concert with the *Terry II* non-party appellants previously had been found in contempt of the court's order. There is no support for this proposition in our opinion in *Terry II*.

[2] We find it unnecessary to address the arguments concerning whether the contempt sanctions were also compensatory in nature. The sanctions were imposed on each of the appellants in this case to compel obedience to a lawful court order. Under our teaching in *Terry I* and *Terry II* these awards are clearly ones for civil, not criminal, contempt. Therefore, we are without jurisdiction to hear this appeal.

[996] Appellants contend that, even if we hold that these are orders of civil contempt, we should vacate the amount

and disposition of the sanctions. We disagree. Because we lack jurisdiction over these appeals we cannot consider the merits of this contention or of any of appellants' other arguments. Appellants could have challenged the merits of these contempt orders on an appeal from the preliminary injunction. However, their counsel indicated during oral argument that for financial reasons they chose not to do so.

Finally, we see no reason to follow appellants' alternative suggestion that we invoke the extraordinary power of mandamus and decline to do so.

CONCLUSION

We dismiss both appeals for lack of appellate jurisdicition.

APPENDIX D

PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.,

Plaintiffs,

v.

PROJECT RESCUE WESTERN NEW YORK, ET AL.,

Defendants.

No. CIV-90-1004A

Unites States District Court
Western District of New York

DEFENDANTS' STIPULATIONS

In the interest of greatly expediting the anticipated hearing before this Court on plaintiffs' motion for a preliminary injunction, and to eliminate the need for a great deal of proof, defendants hereby propose the following two stipulations with respect to this Court's preliminary injunction.

I. *THE INJUNCTION AGAINST "BLOCKADES"*

Following the conclusion of this Court's hearing on the preliminary injunction application, defendants will consent to the entry of a preliminary injunction which would enjoin and restrain defendants from:

> Blocking or obstructing ingress into or egress from any facility at which abortions are performed in the Western District of New York, including trespass upon buildings where those abortions are performed, and trespassing on private property by individuals acting in concert with others who are at that time and place blocking or obstructing ingress into or egress from such facilities.

This stipulation is intended to track almost exactly the language of the first subparagraph of the injunction upheld in *New York State NOW v. Terry*, 886 F.2d 1339, 1345 n.1 (2d Cir. 1989). The only deviation from the exact language used in that case is intended to clarify that this stipulation would not reach the conduct of some individual who was doing nothing other then trespassing on private property outside of an abortion building at a time when no individual was engaged in blocking or obstructing access to that facility -- a unique situation which was not even considered by the federal courts in the *Terry* case, and which does not pose any danger of the sort of "irreparable injury" identified by the Court in that case.

This stipulation is with respect to a preliminary injunction only, and is not binding upon any of the defendants at the time this Court elects to decide whether to enter a permanent injunction in this case. The stipulation is grounded in part upon certain questions which have already been decided adversely to defendants by the Court of Appeals for this Circuit, but which the United States Supreme Court has recently agreed to review.

Defendants' willingness to enter into this stipulation is also grounded in part upon the fact that this Court has already denied their motion to dismiss the complaint under the abstention doctrine. This stipulation is without prejudice to the right of the

defendants, if they desire, to appeal from any preliminary injunction issued by this Court on the grounds that the entire complaint should have been dismissed for the reasons already set forth in defendants' motion to dismiss the complaint.

II. *IDENTITY OF THE DEFENDANTS*

Although defendants have denied the existence of a "conspiracy" as described in the complaint, they see no point in putting the parties and the Court through the expense and delay of attempting to prove, at this early stage of the case, exactly which defendants are or are not members of the so-called "conspiracy." For that reason, and to greatly streamline the length of this Court's hearing, defendants will stipulate as follows. If this Court concludes that some or all of the relief requested by plaintiffs should be granted on a preliminary injunctive basis, defendants will consent to the entry of such an injunction against each and every one of them. Assuming that plaintiffs can satisfy the prerequisites for the issuance of a preliminary injunction, including the possibility of irreparable injury, this stipulation will totally eliminate the need for plaintiffs to offer any proof as to which of the individual defendants are likely to engage in such conduct if not enjoined during the pendency of this action. (Of course, defendants do not concede that any of them are likely to engage in any specific acts or conduct in the absence of an injunction, but those defendants who have no intention of engaging in certain forms of activity will not object to the entry of a preliminary injunction against such activities.)

As with the first stipulation outlined above, this stipulation is for the purposes of a preliminary injunction only. It is intended only to streamline the scope of anticipated proof at this Court's preliminary injunction hearing, and will not waive the right of any individual defendant, as appropriate, to object to

the entry of any permanent injunction against them individually at the time of the final trial on the merits of this action, and after the completion of pretrial discovery in this case.

DATED: Buffalo, New York
March 5, 1991

/s/
James J. Duane, Esq.

Attorney for Defendants
CONNORS & VILARDO
42 Delaware Avenue, Suite 710
Buffalo, New York 14202
(716) 852-5533

APPENDIX E

PRO-CHOICE NETWORK OF WESTERN NEW YORK, Buffalo GYN Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., P.C., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, Alexander Women's Group,

Plaintiffs,

v.

PROJECT RESCUE WESTERN NEW YORK, Operation Rescue, Project Life of Rochester, Rev. Paul Schenck, Rev. James L. Evans, Rev. Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Rev. Daniel Hamlin, James Handyside, Pamela Huffnagle, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Doe(s) and Jane Doe(s), the List Two Being Fictitious Names, the Real Names of Said Defendants Being Presently Unknown to Plaintiffs, Said Fictitious Names Being Intended to Designate Organizations or Persons Who Are Members of Defendant Organizations, and Other Acting in Concert With Any of the Defendants

Who Are Engaging in, or Intend to Engage in, the Conduct Complained of Herein,

Defendants.

No. 90-CV-1004A.

United States District Court,
W.D. New York.

February 14, 1992.

[1421][1] Isabelle Marcus, Lucinda Finley, Glenn Murray, Buffalo, N.Y., for plaintiffs.

James Duane, Virginia Beach, Va., for defendants.

DECISION AND ORDER

ARCARA, District Judge.

I. INTRODUCTION

Presently before the Court is plaintiffs' motion for a preliminary injunction, pursuant to Fed.R.Civ.P. 65(a), enjoining defendants from engaging in an allegedly illegal effort to prevent women from obtaining abortions and other gynecological and family planning services in a number of medical and family planning clinics located throughout the Western New York area. An evidentiary hearing was held over the course of several days from March 6, 1991 to April 1, 1991.

---

[1] Bracketed numbers in bold type indicate page numbers from decision reported at 799 F.Supp. 1417 (W.D.N.Y. 1992).

The parties were then given an opportunity to brief and argue their respective positions. The Court has also considered evidence adduced at the contempt hearings of defendants Nancy Walker, Bonnie Behn, Carla Rainero, Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue Western New York ("Project Rescue"). Each of these defendants was charged with violating the Court's temporary restraining order ("TRO") in this case.

As part of their response to the motion for a preliminary injunction, defendants have moved the Court to reconsider its Decision and Order dated October 29, 1990, denying defendants' motion to dismiss the action pursuant to the abstention doctrine.

After considering the evidence adduced at the preliminary injunction and contempt hearings, reviewing the submissions of the parties, and hearing argument from counsel, the Court grants plaintiffs' motion for a preliminary injunction. The preliminary injunction is attached as an appendix to this Decision and shall also be filed under separate cover. Further, the Court has reconsidered its Decision and Order dated October 29, 1990, and denies defendants' motion to dismiss the action based on the abstention doctrine. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

II. BACKGROUND

Plaintiffs, Buffalo GYN Womenservices, Erie Medical Center, Paul Davis M.D., Shalom Press M.D., Barnett Slepian M.D., Highland Obstetrical Group and Alexander Women's Group, are health care providers located in the Western New York area. They offer family planning services, abortion services and gynecological services at their health care facilities. Plaintiff Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. Its primary goal

is to maintain legal and safe access to family planning and abortion services in the Western New York area. It also organizes some of its **[1422]** members to serve as escorts for patients seeking access to plaintiff health care providers' facilities.

Defendants include three organizations, Project Rescue Western New York, Operation Rescue and Project Life of Rochester, and fifty individuals opposed to abortion and dedicated to the "pro-life" movement.[1] Plaintiffs allege that defendants have been engaged in a consistent pattern of illegal conduct at plaintiffs' health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of patients and staff.

On September 24, 1990, plaintiffs commenced this action by filing a Complaint asserting seven causes of action. The first cause of action asserts claims under 42 U.S.C. § 1985(3), based on an alleged conspiracy to deny women seeking abortion or family planning services the equal protection of the laws and the equal privileges and immunities of national citizenship. More specifically, plaintiffs allege that defendants have conspired to infringe the constitutional rights of women seeking abortion and family planning services to travel and to choose to have an

---

[1] The Complaint also names as defendants John and Jane Doe. These are obviously fictitious names and are intended to represent members of defendant organizations and others acting in concert with the named defendants.

abortion.[2] The Court has subject matter jurisdiction over this cause of action pursuant to 28 U.S.C. §§ 1331, 1343. The remaining six causes of action assert claims based on New York State law. They include: (1) violation of N.Y.Civ.Rights Law § 40-c, and N.Y.Exec.Law § 296; (2) tortious interference with business; (3) trespass; (4) intentional infliction of emotional harm; (5) tortious harassment; and (6) false imprisonment.[3] These causes of action fall under the Court's supplemental jurisdiction. Along with declaratory and injunctive relief, plaintiffs seek compensatory and punitive damages.

Immediately upon filing their Complaint on September 24,1990, plaintiffs moved for a TRO, pursuant to Rule 65(b), to enjoin a "blockade" that defendants had announced for September 28, 1990. The location of the "blockade" was to be kept secret until the morning it was scheduled to occur. On September 26, 1990, the Court conducted a hearing and heard oral argument on the application for a TRO. On September 27, 1990, after hearing further argument from plaintiffs' counsel and some of the named defendants, and after reviewing the Complaint and supporting affidavits, the Court, following *New*

---

2 The court notes that a case involving similar issues is pending before the United States Supreme Court. *NOW v. Operation Rescue*, 726 F.Supp. 1483 (E.D.Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted, sub nom., Bray v. Alexandria Women's Health Center*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991). While the outcome in that case may require the Court to revisit this Decision, the Court has an obligation to move forward with the law as it currently stands in this Circuit.

3 Plaintiffs filed an Amendment Complaint on October 17, 1990 and a Second Amended Complaint on November 5, 1990. Neither of these complaints changed the substantive claims against defendants. They simply added certain plaintiffs to the action.

York State NOW v. Terry, 704 F.Supp. 1247 (S.D.N.Y.), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990), issued a TRO enjoining defendants from conducting any "blockade" of plaintiffs' medical facilities, and from harassing patients and staff entering or exiting the facilities.

Defendants complied with the TRO by holding a peaceful demonstration, rather than a "blockade," on September 28, 1990. The Court then scheduled a hearing for October 4, 1990, in order to determine whether the TRO should be converted into a preliminary injunction pursuant to Rule 65. At the October 4, 1990 hearing, plaintiffs established service on nearly all defendants, and James Duane, Esq. appeared on defendants' behalf. Mr. Duane alerted the Court that it was defendants' intention to file a motion to either dismiss or stay the action pursuant to the abstention doctrine. The Court then put the parties on a briefing schedule and issued an order extending the TRO until the motion was decided.

[1423] Oral argument on defendants' motion to dismiss or stay the action was held on October 19, 1990. In a Decision and Order dated October 29, 1990, the Court denied defendants' motion. In an Order dated November 2, 1990, the Court, with defendants' consent, ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided.

On October 22, 1990, during the pendency of defendants' motion to dismiss, plaintiffs filed motions for civil contempt against defendants Bonnie Behn and Carla Rainero alleging that they violated the Court's TRO on October 20, 1990. On December 6, 1990, plaintiffs filed a motion for civil contempt against defendant Nancy Walker alleging that she violated the TRO on November 29 and December 1, 1990. On December 14, 1990, plaintiffs filed another motion for civil

contempt against Walker alleging that she violated the TRO on December 8, 1990. On March 26, 1991, plaintiffs filed motions for civil contempt against defendants Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue alleging that they violated the TRO on December 29, 1990.[4]

During the months of December, 1990 and January, 1991, the parties, with the assistance of the Court, attempted unsuccessfully to settle this action. A hearing on the contempt motion against Nancy Walker was then held from February 6, 1991 to February 14, 1991. Then, as stated earlier, a preliminary injunction hearing was held from March 6, 1991 to April 1, 1991. Subsequently, a hearing on the contempt motions against Bonnie Behn and Carla Rainero was held from June 18, 1991 to July 12, 1991. Finally, a hearing on the contempt motions against Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue was held from October 15, 1991 to January 30, 1992.

III. FINDINGS OF FACT

It is indisputable that all defendants in this case share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. To achieve these goals, individual defendants have agreed and combined with one another and with the organizational defendants to coordinate, organize and participate in "rescue" demonstrations at abortion clinics located throughout Western New York, While these "rescue" demonstrations are usually peaceful in nature, they

---

[4] On January 3, 1992, plaintiffs filed a motion for civil contempt against defendants Rev. Paul Schenck and Rev. Daren Drzymala. The Court has not yet held a hearing on this contempt motion.

often become emotionally charged encounters between demonstrators, patients and patient escorts.

During the hearings, several defendants insisted that Project Rescue is not an entity subject to being enjoined or held in contempt. The Court finds that, although not organized in corporate or partnership form, Project Rescue produces and distributes literature that encourages participants to gather in front of abortion clinics and block or impede access to them, has official spokespersons and designated leaders who organize and plan its activities, possesses a mailing address, engages in correspondence, has an active telephone "hotline", seeks donations in its name, and reimburses its members for expenses. Thus, Project Rescue possesses adequate characteristics of a legal entity to be enjoined or held in contempt.

There are three types of "rescue" demonstrations at issue in this case: (1) physically "blockading" health care facilities in order to prevent women seeking abortions and medical personnel from entering or exiting the facilities; (2) constructively "blockading" the clinics by demonstrating and picketing in a loud and disruptive manner outside the health care facilities, and by harassing patients and staff trying to enter such facilities; and (3) "sidewalk counseling" of patients entering the clinic. By disrupting and "blockading" family planning and abortion clinics, and conducting "sidewalk counseling," defendants and their followers hope to: (1) prevent abortions; (2) dissuade women from seeking **[1424]** abortion services; and (3) impress upon the public the moral righteousness of their "pro-life" views.

A. *Blockading*

The first type of "rescue" demonstration involves physically "blockading" access to and egress from the plaintiffs' clinics. This type of "rescue" demonstration is usually well

organized and involves a large number of "pro-life" demonstrators. During these "blockades," the demonstrators trespass on the clinic property and sit or lay in the entrances of the clinic in an attempt to block access to and egress from the clinic. The demonstrators often lock arms or chain themselves together in order to make it more difficult for police to remove them. The plaintiff health care providers have been victims of these "blockades" on numerous occasions. On many of those occasions, the operation of the targeted facility was effectively stopped or significantly hampered. This physical "blockade" type of "rescue" demonstration was the type scheduled by defendants for September 28, 1990, and was the impetus behind the Court's TRO.[5]

B. *Constructive Blockade*

Besides physically "blockading" the clinics, defendants also constructively "blockade" them by demonstrating and picketing around the entrances of the clinics, and by harassing patients and staff entering and leaving the clinics. The constructive "blockade" has the same purpose as the physical "blockade," *i.e.*, to prevent or dissuade patients from entering the clinic. However, instead of physically blocking patient access to the clinics, defendants constructively "blockade" the clinics by forcing patients to run a gauntlet of harassment and intimidation in the hope that the patients will turn away before entering.

---

5 Prior to the preliminary injunction hearing, defendants stipulated that the physical "blockade" type of "rescue" demonstration may be enjoined. Thus, the evidence adduced at the preliminary injunction hearing centered on the constructive "blockade" type of demonstration and "sidewalk counseling." Commendably, there have been no physical "blockades" since the Court issued the TRO.

On days when abortions are scheduled to be performed, defendants and others acting in concert with them under the auspices of the organizational defendants, picket and demonstrate in and around plaintiffs' health care facilities. Demonstrators frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities. The presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger to both the occupants of the cars and the demonstrators themselves. The demonstrators also make loud and disruptive noises and chant persistently. On some occasions, the drivers and occupants of the cars trying to enter the clinic parking lots are so intimidated or confused by the demonstrators that they leave the area thereby causing those occupants seeking heath care to suffer a delay in obtaining such care.

At times, demonstrators yell at patients, patient escorts and medical staff entering and leaving the health care facilities. The demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff. This activity causes stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care.

C. *"Sidewalk Counseling"*

Defendants also engage in an activity that they refer to as "sidewalk counseling." "Sidewalk counseling" consists of proffering literature to women entering the health care facilities and trying to convince them not to undergo an abortion. While [1425] defendants contend that this "sidewalk counseling" is

done in a peaceful, non-threatening manner and is only intended to provide women with the information necessary to make an informed decision about abortion, the evidence adduced at the hearings clearly demonstrates that, because of the highly emotional nature of the abortion issue, and the privacy concerns of the patients, even peaceful counseling, when conducted in the compressed space at the entrances of the medical facilities, often erupts into a charged encounter between "sidewalk counselors," patients and patient escorts.

During these encounters, "sidewalk counselors" often become angry and frustrated when patients and patient escorts persist in entering the clinics.[6] The "counselors" then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering. They continue to do so even after the patients signal their desire to be left alone. The "sidewalk counselors" often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level. At times, the voices of "sidewalk counselors" can be heard inside the health care facilities, thereby disturbing the quiet environment necessary for providing safe and efficacious health care. Some "counselors" have even used bullhorns to reach patients who have already entered the clinics.

---

[6] The Court notes that the patient escorts also become frustrated and angry by the persistence of the "sidewalk counselors." The patient escorts often respond by raising their voices in order to drown out the "counselors'" message, and attempt to block and impede the "sidewalk counselors" from following the patients. While the Court can understand the frustration of the escorts, the evidence adduced at the hearings clearly shows that their behavior often serves only to exacerbate an already difficult situation.

The "sidewalk counselors" are comprised of a small group of dedicated "pro-life" activists who station themselves in front of plaintiffs' medical facilities on a regular basis. Many of the "sidewalk counselors" and other defendants have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff. Defendant Project Rescue offers training in the technique of "sidewalk counseling" and organizes the activities of "sidewalk counselors" by designating times and locations for "counseling," designating site captains for such "counseling," and directing "counselors" to keep a log of their activities and send information about their "counseling" to a designated member of the organization. Project Rescue has also reimbursed "sidewalk counselors" for their expenses.

Besides abortions, plaintiff health care facilities provide women with a variety of other medical and family planning services. Because information about patients is kept strictly confidential, the "sidewalk counselors" do not know which patients entering the facilities are there for an abortion and which are there to obtain some other medical or family planning service. The "sidewalk counselors" target younger-looking women because they are the ones most likely to be seeking an abortion. They also target cars that arrive at the facilities with out-of-state license plates because many of the patients coming to area clinics are from nearby states, especially Pennsylvania and Ohio, and from Canada. There is no way, however, for the "sidewalk counselors" to know for sure whether a woman entering the clinic is even seeking an abortion.

During "rescue" activities, defendants regularly use video cameras. Defendants insist that the purpose of the cameras is to record the actions of the "sidewalk counselors" so that the videotapes can be used to defend the "counselors" against unfounded harassment charges. However, the evidence adduced

at the hearings clearly indicates that, instead of using cameras for defensive purposes, defendants employ them as offensive weapons to intimidate patients seeking abortions.[7]

The videotapes offered by defendants during the contempt hearings show that **[1426]** the operators of the video cameras selectively record only those events that are favorable to defendants. During crucial moments when contemptuous conduct is alleged to have occurred, the camera was either turned off or pointed at the ground. Moreover, while defendants' stated purpose in using the video cameras is to record the activities of the "sidewalk counselors," the videotapes presented at the hearings show that the camerapersons almost always focus on the patient and the patient escorts. The "sidewalk counselors" are often not even on the screen. Thus, defendants' assertion that the cameras are used soelly for defensive purposes is just not credible.[8]

---

[7] The Court heard testimony from two of the individuals who normally operate the video cameras, Michael Prestia and Richard Krolewicz. They stated that the only reason for the cameras being present is to protect the "sidewalk counselors" from unfounded harassment charges. The Court, however, finds that the testimony of these two individuals was biased, suspect and incredible. Their testimony was wrought with inconsistency, and their answers on cross-examination were often non responsive and evasive.

[8] During the hearing on the contempt motion against Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue, plaintiffs made allegations that the videotapes offered into evidence by defendants were edited after the fact in order to eliminate footage damaging to defendants. Accordingly, as part of that hearing, the Court heard testimony from two expert witnesses as to the authenticity of the videotapes. The Court has not yet made a final determination whether the tapes were edited.

Instead, the evidence clearly shows that defendants use cameras as offensive weapons to harass and intimidate patients entering the clinics. Defendants have even pointed the cameras directly into the faces of patients seeking access to the clinics. They have also videotaped patient vehicles and their license plates as they enter the medical facilities. Defendants are well aware that women seeking abortions, especially younger women, are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion, and that the presence of cameras increases patients' fear that their identities might be revealed.

Thus, in view of all the evidence, it is reasonable to infer that defendants use cameras not as a defensive measure against unfounded harassment charges, but as offensive weapons to intimidate and embarrass patients into foregoing their scheduled appointments.

D. *Response of Local Law Enforcement*

Local law enforcement has been unable to respond effectively to plaintiffs' complaints about "pro-life" demonstrators harassing patients and blocking access to the clinics. Defendants participate in their "rescue" activities on a continual basis and the local police do not have the resources necessary to monitor the situation constantly. Often times when they respond to a complaint, the demonstrators simply disperse, only to return later when the police depart. Even when police arrest a "pro-life" demonstrator for harassing a patient, successful prosecution is often difficult because the patient is reluctant to testify or cooperate out of fear that her identity might be made public. Furthermore, the record shows that arrest and conviction pursuant to local laws has not deterred defendants from repeatedly engaging in their illegal pattern of activity.

The large scale "blockades" pose a particular problem for police. The time and location of "blockades" are kept secret from the police so that they will be delayed in responding. Local law enforcement's response to large scale "blockades" requires a substantial commitment of police resources. Testimony adduced at the hearings also indicates that defendants have attempted to strike "deals" with the police as to the conditions under which they will cease their illegal activity, *i.e.*, defendants agree to cease "blockading" only if the clinic is closed down for the rest of the day.

In addition, defendants have attempted to hinder and interfere with local law enforcement by harassing those who invoke legal process against them. Local deputy police chief Samuel Camilleri testified that he and his fellow officers have been the object of harassment--both verbally and by mail--by the demonstrators. Chief Camilleri **[1427]** indicated that this harassment made it more difficult for him to do his job. Similar harassment has been directed against people who have testified against the demonstrators in local criminal court proceedings.

E. *The Health Risks to Women Caused by Defendants' Activities*

Women who have been the target of "sidewalk counseling" or other "rescue" demonstrations usually enter the medical facilities visibly shaken and severely distressed. Several of the plaintiff health care providers testified that, for most women, the decision to undergo an abortion is already difficult and stressful. Plaintiffs presented uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health

care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

Often times, patients are too upset to undergo the medical procedures scheduled for that day and must reschedule the procedure, though there is no guarantee that they will not encounter the demonstrators again upon returning. This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded, or if she becomes so distressed by the "sidewalk counselors" that she cannot undergo surgery, the above-mentioned complications may result.

For some women, the option to reschedule their appointment is not readily available. As stated earlier, many of the women seeking abortions in this area come from out-of-state and cannot readily reschedule their appointments if they are prevented or deterred by defendants' conduct from obtaining the abortion on the scheduled day.

The presence of video cameras is especially distressing to patients seeking abortions. The use of video cameras by defendants often makes patients hysterical or severely upset,

thereby causing a delay in their readiness for prompt medical attention. Furthermore, defendants' use of the video cameras prolongs the patients' stress and anxiety as they worry that their identity may be obtained by defendants and revealed to others, such as family members.

IV. CONCLUSIONS OF LAW

A. *Standing*

In *Terry*, the Second Circuit held that health care providers have independent standing to assert the rights of their patients to travel freely and to obtain abortion services. The court reasoned that a patients' "enjoyment of those rights is inextricably bound up with the activity the litigant wishes to pursue," and thus, the court could be "assured that the clinics represented the rights and interests of the women seeking their assistance." *Terry*, 886 F.2d at 1348 (citations omitted). The Court also held that "pro-choice" organizations have standing as representatives of their membership. *Id.* at 1349.

[1428] B. *Preliminary Injunction*

It is well established in the Second Circuit that a preliminary injunction may be granted only where the movant establishes (1) irreparable harm (if the injunction is not granted), and (2) either (a) the likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor. *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 972 (2d Cir. 1989); *Johnson v. Kay*, 860 F.2d 529, 540 (2d Cir. 1988); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

1. *Irreparable Harm*

"[A] finding of irreparable harm is an absolute prerequisite to the issuance of an injunction...." *Fireman's Fund Ins. Co. v. Leslie & Elliot Co.*, 867 F.2d 150, 151 (2d Cir. 1989).

> To establish irreparable harm, plaintiffs must demonstrate an injury that is neither remote nor speculative, but actual and imminent. The injury must be one requiring a remedy of more than mere money damages. A monetary loss will not suffice unless the movant provides evidence of damage that cannot be rectified by financial compensation.

Tucker Anthony Realty Corp., 888 F.2d at 975 (citations omitted).

[1] A deprivation of constitutional rights that cannot be repaired by an award of damages constitutes irreparable injury. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1026 (2d Cir. 1985); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984). In this case, plaintiffs claim that defendants' "rescue" activities violate the constitutional rights of women to travel and to choose to have an abortion.

[2] Furthermore, as stated in the Court's Findings of Fact, plaintiffs have presented compelling, uncontradicted evidence that defendants' "rescue" activities cause patients stress and anxiety, thereby substantially increasing the risks associated with the medical procedures performed at the clinics. In addition, patients are often: (1) blocked from entering the clinics; (2) intimidated and harassed by defendants thereby

causing them to skip their scheduled appointments; or (3) too upset to undergo the medical treatment scheduled for that day. The resulting delay increases the risks associated with the abortion procedure and may lead to unnecessary complications.

In assessing irreparable injury and the need for injunctive relief, the Court is mindful of the fact the defendants intentionally target young women who are already undergoing the stressful situation of terminating an unwanted pregnancy. Thus, the Court must balance the need to protect these young vulnerable women from defendants' harassment against defendants' First Amendment rights.

The evidence also shows that defendants' activities have an adverse effect on the clinic medical staffs. Witnesses testified to increased stress among staff members that is directly attributable to defendants' "rescue" activities. This increase in stress causes the staff to be distracted and makes it difficult for them to maintain the calm environment necessary for treating patients.

In sum, the Court finds that those women denied unimpeded access to plaintiffs' health care facilities cannot be compensated money damages. Injunctive relief alone can assure women unimpeded access to plaintiffs' clinics. The irreparable harm flowing form defendants' "rescue" activities, including the medical risks and the denial of constitutionally guaranteed rights, is real and threatens to continue. Without some form of injunctive relief, prospective patients will suffer irreparable harm from delayed access to the clinics. *Terry*, 886 F.2d at 1362.

[1429] 2. *Likelihood of Success on the Merits or Sufficiently Serious Questions Going to the Merits to Make Them a Fair Ground for Litigation and a Balance of Hardships Tipping Decidedly in Plaintiffs' Favor*

a. *The 42 U.S.C. § 1985(3) Claims*[9]

To prevail on a § 1985(3) claim, a plaintiff must prove that: (1) defendants engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) acted in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Terry*, 886 F.2d at 1358 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971)). It is well established that § 1985(3) provides a cause of action for private conspiracies. *Id.* (citations omitted). Where the alleged conspiracy is aimed at the deprivation of a constitutional right guaranteed against government interference, for example rights secured by the First and Fourteenth Amendments, plaintiffs must demonstrate "state involvement." *Id.* (citation omitted)

---

[9] Defendants argue that injunctive relief is not available under § 1985(3). However, several federal courts, including the Second Circuit, have held that injunctive relief is available under § 1985(3). *See, e.g., Planned Parenthood v. Holy Angels Catholic Church*, 765 F.Supp. 617 (N.D. Cal. 1991); *Women's Health Care Services v. Operation Rescue-National*, 773 F.Supp. 258 (D. Kan. 1991); *NOW v. Operation Rescue*, 726 F.Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted, sub nom. Bray v. Alexandria Women's Health Center*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991); *Terry*, 704 F.Supp. at 1247; 886 F.2d at 1339; *Cousins v. Terry*, 721 F.Supp. 426 (N.D.N.Y. 1989); *Southwestern Medical Clinics of Nevada v. Operation Rescue*, 744 F.Supp. 230 (D. Nev. 1989).

[3] A conspiracy is with the scope of § 1985(3) only if it is motivated by some class-based, invidiously discriminatory animus. *Griffin*, 403 U.S. at 102, 91 S.Ct. at 1798. "Animus" means a motive or intent to interfere with the exercise of a right; not hostility, ill-will or personal animosity. *Id.* at 102 n.10, 91 S.Ct. at 1798 n.10; *Terry*, 886 F.2d at 1359-60. While the Supreme Court has thus far declined to rule on whether § 1985(3) reaches conspiracies directed against a class identified by characteristics other than race, *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836, 103 S.Ct. 3352, 3360, 77 L.Ed.2d 1049 (1983) ("close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans."); *Griffin*, 403 U.S. at 102 n.9, 91 S.Ct. at 1798 n.9, the Second Circuit in *Terry* expressly held that women seeking abortions constitute a protected class for purposes of § 1985(3). *Terry*, 886 F.2d at 1359.[10]

[4] In this case, plaintiffs have proven, by a preponderance of the evidence, that defendants engaged in a conspiracy to prevent women from obtaining access to plaintiffs' health care facilities. Project Rescue literature encourages participants to gather in front of clinics and block or impede access to them. Defendants agreed between themselves and with others to engage in unlawful activity such as trespassing and harassment. The conspiracy has an official spokesperson and designated leaders. Project Rescue reimburses members for

---

10 The issue of whether women seeking abortions can constitute a protected class under § 1985(3) is currently pending before the Supreme Court. See *NOW v. Operation Rescue*, 726 F.Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted, sub nom., Bray v. Alexandria Women's Health Center*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991).

costs incurred in furtherance of the conspiracy. This concerted effort clearly demonstrates the presence of a conspiracy to engage in an unlawful activity.

It is clear under *Terry* that defendants have the requisite class-based animus. There is uncontroverted evidence that defendants are opposed to the constitutional right of a woman to choose to have an abortion and that the object of their "rescue" activities is to hinder or prevent--**[1430]** a group that is a protected class under § 1985(3)--from exercising that right.

In sum, it is apparent that defendants are acting within the scope of § 1985(3) by: (1) engaging in a conspiracy; (2) against a cognizable class of persons, with invidious class-based animus; and (3) committing overt acts in furtherance of the conspiracy. The only remaining question is whether the conspiracy deprived the plaintiffs, and the women on whose behalf this claim is asserted, of any constitutional right. Plaintiffs claim that defendants' conspiracy infringes two constitutional rights of women seeking abortions: (1) the right to interstate travel; and (2) the right to choose to have an abortion.

(1) *Right to Travel*

[5][6] "[T]he right to interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference." *Griffin*, 403 U.S. at 105, 91 S.Ct. at 1800 (citations omitted). Deprivations of the right to travel are actionable under § 1985(3) with no need to show any state action or involvement. *Terry*, 886 F.2d at 1360 (citations omitted). The right to travel includes the right to unimpeded interstate travel to obtain an abortion and other medical services.

Doe v. Bolton, 410 U.S. 179, 200, 93 S.Ct. 739, 751, 35 L.Ed.2d 201 (1973); *Terry*, 704 F.Supp. at 1259; 886 F.2d at 1360.

[7] In this case, plaintiffs have presented uncontroverted evidence that defendants' "rescue" activities have infringed the right of women to travel interstate to obtain an abortion. Plaintiffs' heath care facilities render services to patients from other states, especially Pennsylvania and Ohio, and Canada. As stated earlier, defendants specifically target these out-of-state patients because they are easily identifiable. When out-of-state patients arrive at the clinics, they encounter "pro-life" demonstrators obstructing the clinic driveways thereby impeding them from entering the clinic parking lots. These obstructions require patients to take circuitous routes in order to enter the clinics unmolested. Out-of-sate patients have been forced to cancel their scheduled appointments on days when there were "rescue" demonstrations. The burden of having to reschedule an appointment is obviously greater for a patient having to travel from another state or Canada than it is for a local patient. In sum, it is clear that infringing the right of women to travel interstate to obtain an abortion is one of the objectives of defendants' conspiracy.

[8] Defendants argue that the right to travel is not implicated here because the primary objective of their "rescue" activities is to prevent women from having abortions, not to infringe the right of women to travel. However, interfering with the right to travel does not have to be the primary objective of defendants' conspiracy in order for § 1985(3) to apply. In *Griffin*, the defendants stopped and assaulted the plaintiffs who were driving on an interstate highway. The defendants had presumed that the plaintiffs, who were black, were involved in the civil rights movement, and wanted to stop the plaintiffs from further organizing civil rights activities. The Supreme Court

held that, while the primary objective of the conspiracy was to interfere with the right of the plaintiffs to engage in organizing civil rights activities, the fact that the interference occurred while the plaintiffs were traveling on an interstate highway was sufficient to implicate the right to travel. *Id.* 403 U.S. at 106, 91 S.Ct. at 1800. Thus, in this case, because plaintiffs have demonstrated that one of the objectives of defendants' conspiracy is to infringe the right of women to travel, § 1985(3) applies.

In sum, the Court finds that the plaintiffs have established a likelihood of success on the merits on their § 1985(3) claim based on the right to travel.

(2) *Right to Choose to Have an Abortion*

[9] The Supreme Court has held that a woman has a constitutional right under the Fourteenth Amendment to choose to have an abortion during the first trimester of her pregnancy without governmental interference. *Roe v. Wade*, 410 U.S. 113, 163, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973). **[1431]** Because the right to have an abortion derives from the Fourteenth Amendment, which prohibits only governmental interference, a conspiracy targeted at that right must implicate "state involvement" before it is actionable under § 1985(3). *Scott*, 463 U.S. at 833, 103 S.Ct. at 3358.

[10] The "state involvement" requirement is not the same as a "state action" test. As the Supreme Court has explained, it is merely "necessary ... to prove that the State was somehow involved in or affected by the conspiracy." *Scott*, 463 U.S. at 833, 103 S.Ct. at 3358; *Terry*, 704 F.Supp. at 1260.

> [If] private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause the authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(3).

Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 384, 99 S.Ct. 2345, 2355, 60 L.Ed.2d 957 (1979) (Stevens, J., concurring); *accord Scott*, 463 U.S. at 840 n.2, 103 S.Ct. at 3362 n.2.

[11] In this case, there has been substantial uncontradicted evidence that defendants' activities are intended, and do in fact, prevent and hinder local police from protecting the right of women to choose to have an abortion. By "blockading" access to abortion clinics in large numbers, refusing to notify police of their next target, attempting to strike "deals" with the police, and harassing the police officers and witnesses who testify against them in local criminal courts, defendants have acted to render local law enforcement officials incapable of keeping the clinics readily accessible to women who choose to have an abortion. Such action by private persons satisfies § 1985(3)'s "state involvement" requirement. *See Women's Health Care Services*, 773 F.Supp. at 265-66; *Terry*, 704 F.Supp. at 1260; *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F.Supp. 165, 168 (D. Oregon), *aff'd as modified*, 859 F.2d 681 (9th Cir. 1988); *but see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991); *Lucero v. Operation Rescue of Birmingham*, 772 F.Supp. 1193 (N.D. Ala. 1991); *Upper Hudson Planned-Parenthood, Inc. v. Doe*, 1991 WL 183863 (N.D.N.Y. Sept. 16, 1991).

[12] Furthermore, it cannot be disputed that defendants' activities have the object of depriving women of their right to choose to have an abortion. In addition, the same facts that satisfy the overt act requirement in connection with plaintiffs' claim based on their right to travel, likewise meet the overt act requirement for this claim. Finally, defendants' actions threaten injury to the protected class of women seeking abortions.

In sum, the Court finds that the plaintiffs have demonstrated a likelihood of success on the merits of their § 1985(3) claim based on the right of women to choose to have an abortion.

b. *State Law Claims*

(1) *New York Civil Rights Law*

[13] Having demonstrated a likelihood of success on the merits of their federal § 1985(3) claim, plaintiffs have also, by definition, demonstrated a likelihood of success on their claim under N.Y. Civ. Rights Law § 40-c. This section, which affords a private right of action against private individuals, provides that "no person shall, because of ... sex ... be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.05 of the penal law, in exercise thereof, by any persons ...." Since defendants' conspiracy is intended to deprive women of their constitutional rights to travel and to choose to have an abortion, and subjects them to harassment when they seek to exercise those rights, the conspiracy clearly violates N.Y. Civ. Rights Law § 40-c. Thus, plaintiffs have demonstrated a likelihood of success on the merits of this claim.

(2) *Trespass*

[14][15] Under New York law, trespass is the interference with a person's right to possession of real property either by an **[1432]** unlawful act or by a lawful act performed in an unlawful manner. *Ivancic v. Olmstead*, 66 N.Y.2d 349, 352, 497 N.Y.S.2d 326, 488 N.E.2d 72 (1985), *cert. denied*, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 658 (1986). To be liable, the trespasser need not anticipate the damaging consequences of his acts, but need only intend the act that amounts to an unlawful intrusion upon and interference with the property rights of another. *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331, 121 N.E.2d 249 (1954). The threat of continuing trespass entitled a property owner to injunctive relief where irreparable injury may result. *Terry*, 886 F.2d at 1361 (citing *Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N.Y. 260, 268, 157 N.E. 130 (1927)).

[16] In this case, there is overwhelming evidence that defendants have repeatedly trespassed upon plaintiffs' property in the past and may continue to trespass in the future. A "blockade" is an intentional, unlawful act that clearly interferes with plaintiffs' right to possession of the facilities. Accordingly, plaintiffs have demonstrated a likelihood of success on the merits of their state trespass claim.[11]

---

[11] In light of the Court's decision with regard to plaintiffs' § 1985(3) claim, N.Y. Civ. Rights Law § 40-c claim and state trespass claim, the Court need not address whether a preliminary injunction should be granted based on plaintiffs' other state law claim.

C. *Restriction on Defendants' First Amendment Rights*

[17] There is no question that defendants' activities constitute a form of political speech protected by the First Amendment. Defendants are entitled to express their views on abortion, "particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted." *Terry*, 886 F.2d at 1363 (citing *United States v. Grace*, 461 U.S. 171, 177-80, 103 S.Ct. 1702, 1706-09, 75 L.Ed.2d 736 (1983)). Yet, the First Amendment does not provide defendants with the "right to express their views to any person, at any time, in any manner, and in any place they may choose." *Id.* (citing *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)). Reasonable time, place and manner restrictions may be placed on defendants' activities as long as such restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988) (citations omitted); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). "The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable .... The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972) (citations omitted).

After applying these principles to this case, the Court finds that the preliminary injunction is: (1) content neutral; (2)

narrowly tailored to serve a number of significant government interests; and (3) leaves open ample alternative channels for communication of defendants' message. Thus, the injunction is a reasonable time, place and manner restriction and is not violative of defendants' First Amendment rights.

1. *Content Neutral*

[18] Content-neutral regulations of expression are "those that 'are justified without reference to the content of the regulated speech.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976)). "The primary concern of content-neutrality is that no speech or expression of a 'particular content' is 'singled out' by the government for better or worse treatment." *Terry*, 886 F.2d at 1363 (citations omitted).

[1433] [19] In this case, the preliminary injunction is content-neutral. It regulates when, where and how defendants may speak, but not what they may say. The injunction makes no mention whatsoever of abortion or any other substantive issue; it merely restricts the volume, location, timing and harassing and intimidating nature of defendants' expressive speech. In fact, the injunction would apply equally to protests that support abortion, or indeed, to protests supporting or opposing any other cause. It is true that the injunction applies only to the defendants, but that is because it is only the defendants who have created a threat of harassment and intimidation. Thus, the injunction meets the content-neutral requirement.

2. *Narrowly Tailored to Serve a Significant Government Interest*

[20] There is no doubt that the preliminary injunction is necessary to serve several significant governmental interests. As stated earlier, the evidence adduced at trial clearly establishes that defendants' "rescue" activities significantly increase the health risks associated with the medical procedures performed at the plaintiffs' clinics. "The government 'may properly assert important interests in safeguarding health' and 'in maintaining medical standards' as regards the performing of abortions." *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 63 (3d. Cir. 1991) (quoting *Roe v. Wade*, 410 U.S. at 154, 93 S.Ct. at 727). Further, the government "has a legitimate interest in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade*, 410 U.S. at 150, 93 S.Ct. at 725. Thus, the Court finds that the injunction serves the significant governmental interest of ensuring that abortions are performed safely. *See Northeast Women's Center*, Inc., 939 F.2d at 63; *Portland Feminist Women's Health Center*, 859 F.2d at 686.

In addition, the injunction effectuates the significant governmental interest of public safety. *Terry*, 886 F.2d at 1364. The injunction prohibits defendants from blocking traffic entering and leaving the clinics. It also prohibits defendants from abusing, grabbing, touching, pushing, shoving or crowding persons entering or leaving the clinics.

Finally, the injunction serves the significant governmental interest of ensuring "the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another." *Terry*, 886 F.2d at 1364. While defendants have a First Amendment right to express their opposition to abortion, women entering the clinic have the constitutional rights to travel unimpeded and to choose to have an abortion. Thus,

the Court has attempted to fashion an injunction that will ensure that the constitutional rights of both parties are protected to the fullest extent possible.

[21] Having established that there are significant governmental interests at stake, the Court must next determine whether the injunction is "narrowly tailored" to meet these interests. Defendants have stipulated to the entry of an injunction against "blocking or obstructing" access to plaintiffs' health care facilities and trespassing on such premises for the purpose of "blocking or obstructing" access. While the Court's preliminary injunction encompasses the conduct covered by defendants' stipulation, it is more comprehensive in order to cover the full range of defendants' activities. The Court's preliminary injunction is better tailored to the evidence and addresses not only physical "blockades," but other "rescue" activities as well.

In crafting the injunction, the Court has been guided by the paramount need to maintain an atmosphere conducive to the health care functions of plaintiffs' facilities. As the Supreme Court has advised, in evaluating the need for and legitimacy of restrictions on expressive activity, courts must keep in mind the normal functions of the location in question and whether the nature of the demonstration activity is conducive **[1434]** to or disruptive of normal activities. *Grayned*, 408 U.S. at 116, 92 S.Ct. at 2303. Here, in the context of health care facilities treating women who are already undergoing the stress normally associated with having an abortion, there is an attendant need for a calm, quiet, stress-free atmosphere. Defendants' noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in such a setting. The significant governmental interest inherent in providing safe medical care to the public justifies certain carefully drawn restrictions on defendants' expressive activities. *See Beth Israel Hosp. v.*

NLRB, 437 U.S. 483, 507-08, 98 S.Ct. 2463, 2477, 57 L.Ed.2d 370 (1978); *Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist.*, 670 F.2d 629, 632 (5th Cir. 1982).

[22] Paragraph (a) of the injunction is aimed at preventing defendants from obstructing and impeding access to plaintiffs' health care facilities. Paragraph (a) covers the full range of defendants' obstructive behavior including: obstructing and impeding access to and egress from the clinics, congregating in private driveways and parking lots, surrounding the cars of patients and staff as they try to enter the driveways and parking lots of the clinics, and crowding, shoving or interfering with patients and staff as they approach the clinic on foot. As the Second Circuit noted in *Terry*, there is simply no First Amendment right to impede or obstruct access to public or private buildings. *Terry*, 886 F.2d at 1364 (citations omitted). Likewise, there is no First Amendment right to picket in a private driveway or parking lot.

[23] Paragraph (a) also enjoins trespassing on all areas of plaintiffs' health care facilities including parking lots and other surrounding property. This provision is necessary because of the uncontroverted evidence that defendants continuously trespass on the clinics' private property while they are demonstrating, picketing and "sidewalk counseling," as well as when they engage in physical "blockades." There is simply no First Amendment right to trespass upon private property, even when access to that property may be the only, or most effective, way to reach the intended audience. *See Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (finding no constitutional right to engage in labor picketing in a shopping center, even though picketing in that location was the only effective way for the labor union to reach its intended audience).

Paragraph (b) of the preliminary injunction secures unfettered access to the clinics by setting dual "clear zones" of fifteen feet around entrances and fifteen feet around people and vehicles seeking access. The "clear zones" are necessary to ensure that people and vehicles seeking access to the clinics will not be impeded, and will be able to determine readily where the entrances are located. Further, the "clear zones" will prevent defendants from crowding patients and invading their personal space. The Supreme Court has upheld "clear zones" in other demonstration contexts. *See, e.g., Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (upholding a Washington D.C. ordinance prohibiting picketing within 500 feet of a foreign embassy); *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) (upholding ban on picketing within 100 feet of a courthouse); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) (upholding ban on picketing within 100 feet of a jail).

The injunction's "clear zones" are not absolute. In an attempt to accommodate fully defendants' First Amendment rights, the Court, in paragraph (c) of the injunction, has made an exception to the "clear zones" for "sidewalk counselors." Paragraph (c) provides that a maximum of two "sidewalk counselors" may enter the fifteen foot "clear zones" around entrances and people approaching the clinics, for the purpose of counseling in a non-threatening manner. However, paragraph (c) also provides that once the targeted person or group of persons indicates, either verbally or non-verbally, that they do not wish to be counseled, the "sidewalk counselors" must "cease to desist" from counseling and move out of the fifteen foot "clear [1435]

zones."[12] This "cease and desist" provision is necessary in order to protect the right of people approaching and entering the facilities to be left alone.

[24] Defendants strenuously object to the "cease and desist" provision of the injunction. They argue that, because their "sidewalk counseling" occurs on a public sidewalk, they cannot be forced to cease communicating their message just because their audience may be unwilling to hear it. The Court, however, rejects this argument.

[25][26] There is no First Amendment right to communicate one's views to anyone, at any time, in any manner, or in any place that may be desired. *See Heffron*, 452 U.S. at 647, 101 S.Ct. at 2563. When speakers' interests conflict with those of unwilling listeners, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970). "[N]o one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 738, 90 S.Ct. at 1491.

[27] When a case presents a conflict, as this one does, between the right to speak and the right to be left alone, the Supreme Court has held that the right of the unwilling listener to

---

12 A similar "cease and desist" provision is included in the Court's TRO. There was testimony adduced at the hearings that defendants have attempted to circumvent this provision by using a "relay" system, *i.e.*, once the targeted person rejects the counseling of a particular "sidewalk counselor," another one steps forward and continues counseling. This "relay" system obviously violates the spirit, if not the letter, of the Court's TRO. Once the targeted person or group of persons rejects counseling, that rejection is applicable to all "sidewalk counselors."

be left alone is paramount when that listener is a "captive audience." *See, e.g. Frisby*, 487 U.S. at 474, 108 S.Ct. at 2495; *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542, 100 S.Ct. 2326, 2335, 65 L.Ed.2d 319 (1980); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). The "captive audience" doctrine, simply stated, is that a listener has a right not to be exposed to an unwanted message in circumstances in which the communication cannot be avoided. *Frisby*, 487 U.S. at 488, 108 S.Ct. at 2504 (upholding local ordinance banning "focused" picketing of a single residence); *Lehman*, 418 U.S. at 298, 94 S.Ct. at 2714 (upholding ban on political messages on public buses because the need of riders on public transportation to get where they wanted to go made it practically impossible for them to avoid unwanted political messages); *Rowan*, 397 U.S. at 728, 90 S.Ct. at 1484 (upholding statute that allowed householder to require Postmaster General to order senders of "junk" mail to remove addressee's name from sender's mailing list); *Kovacs*, 336 U.S. at 77, 69 S.Ct. at 448 (upholding ban on amplified sound trucks because they are so intrusive that they made it impossible for people to escape their message).

[28] The "captive audience" doctrine is an essential component of First Amendment freedoms since the same interest in personal autonomy underlies both the right to speak and the right to be left alone. "The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe as one wishes, are important aspects of the constitutional right to be let alone." *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 468, 72 S.Ct. 813, 823, 96 L.Ed. 1068 (1952) (Douglas, J., dissenting) (Justice Douglas' dissenting position in *Pollak*, that a state

authority had no right to broadcast radio messages onto public transit, became the holding of the majority of the Court in *Lehman*). The "captive audience" doctrine stems from the fact that it is possible "to jeopardize autonomy of thought by communication to parties who do not wish to receive a message. The personal right of a listener to refuse to hear a given message is jeopardized by the speaker who blocks the listener's path to communicate his message ...." *Taylor*, I'll Defend to the Death Your Right to Say It ... But Not to Me--The Captive Audience Corollary **[1436]** to the First Amendment, 1983 S. Ill. Univ. L.J. 211, 215-16 (1983).

[29] In general, the "captive audience" doctrine does not apply when the unwilling listeners or viewers are located on the public street or sidewalk because they can avoid the unwanted message simply by walking away or averting their eyes. *Erznoznik v. Jacksonville*, 422 U.S. 205, 211, 95 S.Ct. 2268, 2273, 45 L.Ed.2d 125 (1975); *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971). However, whenever someone cannot, as a practical matter, escape from the unwanted intrusion, the speaker's expressive activity can be restricted under the "captive audience" doctrine. *Frisby*, 487 U.S. at 487, 108 S.Ct. at 2504; *Lehman*, 418 U.S. at 298, 94 S.Ct. at 2714; *Rowan*, 397 U.S. at 728, 90 S.Ct. at 1484; *Kovacs*, 336 U.S. at 77, 69 S.Ct. at 448.

In this case, women seeking access to one of plaintiffs' clinics for the purpose of having an abortion are a "captive audience" for defendants' "pro-life" message. Women have a constitutional right to choose to have an abortion. In order to safely exercise that right, women must have access to licensed health care facilities that perform abortions. There are a limited number of such facilities in this area. Defendants are well aware of this fact and obviously target their message at women seeking

access to these facilities. Defendants surround the facilities and force women seeking access to them to run a gauntlet of demonstrators, picketers and "sidewalk counselors." The evidence adduced at the hearing clearly shows that, even when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message. It is obvious, therefore, that women seeking access to plaintiffs' facilities cannot, as a practical matter, escape defendants' message. Defendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid receiving defendants' message. The only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion. Thus, women entering plaintiffs' clinics are a "captive audience" for defendants' message and the "cease and desist" provision of the injunction is warranted.[13]

---

[13] If, in the future, the Court finds that the "cease and desist" provision is not obeyed, it will not hesitate to impose stricter restrictions on defendants' right to communicate with women entering the clinics. *See Portland Feminist Women's Health Center*, 859 F.2d at 681 (*affirming*, over First Amendment challenge, an injunction setting up at twenty-five foot clear zone around the entrance to the health care facility; no demonstrating of any sort, including counseling, could occur within this clear zone; *see also Bering v. SHARE*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (1989); *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530 (1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 75, 116 L.Ed.2d 49 (1991); *Planned Parenthood Ass'n of Cincinnati v. Project Jericho*, 52 Ohio St.3d 56, 556 N.E.2d 157 (1990).

The Court notes that the "cease and desist" provision of the injunction is more limited in scope than other restrictions upheld in "captive audience" cases such as *Lehman* and *Kovacs*. In this case, the "cease and desist" provision shields only unwilling listeners from defendants' message. In *Lehman* and *Kovacs*, however, both willing and unwilling listeners were prevented from hearing the speakers' message. Thus, the Court's "cease and desist" provision advances the values of the marketplace of ideas by permitting listeners to exercise their autonomy to make their own determinations among competing ideas. Once a woman seeking access to one of the clinics has made a determination not to listen to defendants' message, defendants must respect her choice.

Paragraph (d) of the injunction prohibits defendants from using any loud speakers or sound amplification devices in order to disturb the patients and staff inside the clinics. The use of such equipment obviously disturbs the calm environment necessary for the rendering of safe health care.

In sum, the Court finds that the restrictions on defendants' expressive activities **[1437]** contained in the injunction are reasonable in light of the functions of plaintiffs' health care facilities and the nature of defendants' past conduct. Further, these restrictions are narrowly tailored to meet several significant government interests, including the need to provide safe health care to women seeking abortions, public safety, and the need to balance the rights of women to choose to have an abortion with defendants' First Amendment rights.

3. *Ample Alternative Channels for Communication*

[30] The Court's injunction leaves open ample alternative channels for communication of defendants' message. Defendants may still assemble near plaintiffs' clinics so long as they remain outside the fifteen foot "clear zones." They can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by. If confined to the area fifteen feet away from the entrances of the clinics' driveways and parking lots, defendants and their picket signs will still be visible to people approaching the clinic and their message will still be conveyed.

Paragraph (c) of the injunction allows a maximum of two "sidewalk counselors" to approach people entering the clinics for the purpose of offering them counseling in a non-threatening manner as long as they "cease and desist" from such counseling if the person or group of people targeted indicate that they wish to be left alone. Once the target of the counseling indicates a desire to be left alone, the "sidewalk counselors" must move out of the fifteen foot "clear zone." Once outside the "clear zone," the "counselors" may resume their expressive activity in accordance with the preliminary injunction.

Furthermore, the injunction is intended not only to protect the rights of the women entering the clinics, but those of defendants as well. The injunction specifically states that "nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights ...."

Thus, the Court finds that the injunction leaves defendants ample alternative means for communicating their message.

D. *Restriction on the Use of Cameras*

[31] Plaintiffs have requested that defendants be prohibited from photographing, or appearing to photograph, with either a still or moving picture camera, any persons entering or exiting plaintiffs' facilities. Plaintiffs argue that the taking of photographs and the videotaping of patients entering the clinics violates the patients' constitutional right to privacy and should be enjoined. There is no precedent, one way or the other, dealing with the taking of photographs or videotapes of patients entering abortion or family planning clinics, and the constitutional right privacy. However, the Supreme Court has dealt with cases involving the conflict between the patient's right to privacy and physician reporting requirements of abortion information to state authorities. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80, 96 S.Ct. 2831, 2846, 49 L.Ed.2d 788 (1976). These decisions evince a strong concern for protecting and maintaining the anonymity of women seeking and undergoing abortions.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80, 96 S.Ct. 2831, 2846, 49 L.Ed.2d 788 (1976), the Supreme Court upheld a Missouri statute providing reporting and recordkeeping requirements for health care facilities and physicians performing abortions. The Court held that "[r]ecordkeeping and recording requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." *Id.* at 80, 96 S.Ct. at 2846. The Court found that, because the information to be reported under the Missouri statute was not overdone or burdensome and the records were kept strictly

confidential by state public health **[1438]** officials, the statute was not unconstitutional. *Id.*

In *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), the Court struck down a Pennsylvania law containing a detailed reporting provision for physicians performing abortions.[14] Although these reports were not public records in their original form, the law provided for public inspection and copying of the records after the physician's name was removed and replaced with a confidential identifying number. The Court held that the scope of the information required by the reporting provision and the information's availability to the public belied the state's assertion that it was advancing any legitimate interest. *Id.* at 766, 106 S.Ct. at 2181. The Court found that the reports required under the statute went "well beyond the health-related interests that served to justify the Missouri reports under consideration in *Danforth*." *Id.* The Court stated that "[t]he decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity." *Id.* In support of this position, the Court quoted with approval Justice Stevens' concurring opinion in *Bellotti v. Baird*, 443 U.S. 622, 655, 99 S.Ct. 3035, 3054, 61 L.Ed.2d 797 (1979), that:

> It is inherent in the right to make the abortion decision that the right may be exercised without

---

[14] The reporting provision required physicians performing abortions to file with the state a report identifying the performing and referring physician by name and the facility where the abortion was performed; information about the woman's political subdivision and state of residence; her age, race, marital status, and number of pregnancies, and other information related to gestational age.

> public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.

Id. 476 U.S. at 766, 106 S.Ct. at 2181. The Court further found that, while the statute did not require the woman's name to be reported, the obvious purpose of the extreme reporting requirements was to identify women who obtained abortions. Thus, the Court concluded, the statute did not adequately protect the privacy interests of women having abortions and was therefore invalid.

Thornburgh and *Danforth* stand for the proposition that information gathering about women having abortions is permissible only if there is a legitimate need for such information and the confidentiality and privacy of the women are closely safeguarded. Based on the authority of *Thornburgh* and *Danforth*, a state could not, consistent with the right of privacy, maintain a file of photographs of women seeking abortion services without taking extraordinary precautions against public disclosure. Any risk of revelation of so uniquely identifying a piece of information as a photograph to anyone other than duly authorized public health authorities would certainly violate the aspect of the right to privacy that includes the right to choose to have an abortion.

It follows, therefore, that if the state cannot do what defendants here do, namely take and disclose photographs and videotapes of women seeking access to abortion services, without seriously infringing the constitutional right of privacy, then certainly defendants, pursuant to their § 1985(3) conspiracy, cannot collect and maintain a photographic record of women seeking access to abortion services. As explained in *Thornburgh* and *Danforth*, the decision to obtain an abortion "is an intensely private one that must be protected in a way that insures

anonymity." *Id.* 476 U.S. at 766, 106 S.Ct. at 2181. It is unavoidable that, in exercising her right to have an abortion, a woman must momentarily travel on a public sidewalk or street in order to get to the doctor's office. However, this fact should not allow defendants to freely intrude upon a woman's right to privacy. What is particularly bothersome is that when the intruder is an individual rather than the government, the use of the photographs and videotapes is left to the sole discretion of the intruder with no concern for the well-being of the woman.

[1439] Defendants have suggested that, if the Court decides that some type of injunctive relief is appropriate with regard to the use of cameras, it should only enjoin defendants from: (1) disseminating the photographs and videotapes; and (2) making any effort to identify the patients revealed therein. Defendants argue that such an injunction would ensure the privacy of abortion patients and eliminate any danger of public exposure or identification.

Defendants' argument ignores the intimidating effect of cameras being present at the entrances of the clinics. As stated in the Court's Findings of Fact, defendants use still and video cameras as offensive weapons to intimidate women seeking access to the clinics. Defendants are well aware that women, especially younger women, seeking abortions are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion. Defendants attempt to capitalize on this fear by using cameras as a means to threaten and intimidate these women with the prospect that, if they go through with the abortion, their identities may be revealed.

The Court finds it helpful to draw an analogy between use of cameras in this case and the civil rights movement of the sixties. During the civil rights movement, segregationists congregated in front of schools and polling places with attack

dogs and clubs in order to intimidate blacks into foregoing their constitutional rights to an integrated education and to vote. Here, defendants are attempting to prevent women from exercising their constitutional right to choose to have an abortion. However, instead of using dogs and clubs, defendants use cameras and the threat of exposure to scare and intimidate vulnerable women into foregoing their constitutional rights. While the immediacy and severity of the threat posed by the cameras is obviously less, the camera, like the attack dog, is just a tool used by defendants to intimidate women from exercising their constitutional rights and may be restricted without violating defendants' rights.

In sum, the privacy rights of women entering the clinics and the intimidating effect upon women of cameras being present outside the clinics, are factors that weigh heavily in favor of restricting defendants use of cameras in this case. However, while the Court finds that plaintiffs' request for an injunction against the use of cameras may be warranted, it will decline, at this time, to enjoin or restrain the use of cameras. As stated earlier, there is no clear precedent for such an injunction. The Court will therefore give defendants an opportunity to conform their activities consistent with the Court's concerns over the privacy rights of women entering the clinics and the intimidating effect of cameras being present outside the clinics. If, however, defendants continue to use cameras as offensive weapons to intimidate and harass women entering the clinics, the Court will not hesitate to restrict defendants' use of cameras.

E. *Abstention*

[32] Defendants have moved the Court to reconsider its Decision and Order dated October 29, 1990, denying defendants' motion to dismiss the action based on the abstention doctrine. Defendants assert that such reconsideration is appropriate in light

of the Second Circuit's recent decision in *Temple of the Lost Sheep, Inc. v. Abrams*, 930 F.2d 178 (2d Cir. 1991). The Court has reviewed *Temple of the Lost Sheep* and finds it inapplicable to this case. The plaintiff in *Temple of the Lost Sheep* was given a full and fair opportunity to litigate its federal claims in state court. *Id.* at 184. In this case, however, plaintiffs have not asserted any federal claims in the state court proceeding. Furthermore, for all intents and purposes, the state court proceeding is "dead in the water." Counsel for plaintiffs in that case has submitted an affidavit to this Court stating that "although no motion has been made to dismiss the action and no stipulation of discontinuance has been executed, the action is, for all practical purposes, abandoned." Thus, after reconsideration, the Court denies defendants' **[1440]** motion for dismissal of the action based on the abstention doctrine.

V. CONCLUSION

For the reasons stated, the Court grants plaintiffs' motion for a preliminary injunction. The preliminary injunction is attached as an Appendix to this Decision and shall also be filed under separate cover. Further, after reconsidering its Decision and Order dated October 29, 1990, the court denies defendants' motion to dismiss the action based on the abstention doctrine.

It is so ordered.

APPENDIX
PRELIMINARY INJUNCTION

Upon consideration of the evidence introduced at a hearing held on plaintiffs' motion for a preliminary injunction, and at hearing on plaintiffs' motions to find defendants Nancy Walker, Bonnie Behn, Carl Rainero, Rev. Paul Schenck, Rev.

Robert Schenck and Project Rescue in civil contempt for violations of this Court's Temporary Restraining Order, and upon consideration of the complaint and supporting documents, and upon consideration of defendants' stipulations pertaining to the entry of a preliminary injunction against certain conduct and to the binding nature of any preliminary injunction on all named individual and organizational defendants, it is hereby

ORDERED that defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

1. Enjoined and restrained in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are preformed in the Western District of New York;

(b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

(c) physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed; provided however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. In addition, it is further provided that this right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or such reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site;

(d) using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed, nor shall any person make such [1441] sounds which interfere with the rights of anyone not in violation of this Order;

(e) attempting, or inducing, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a) through (d) above; and it is further

ORDERED that nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights; and it is further

ORDERED that the defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make a good faith effort to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated above not to engage or participate in the activities enjoined in paragraphs (a) through (e) above;

2. IT IS FURTHER ORDERED that the failure to comply with this Order by any defendant or anyone acting in their behalf or in concert with them shall be subject to civil damages of $10,000 per day for the first violation of this Order and/or may subject them to criminal contempt proceedings; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine and/or criminal contempt proceedings; and is further

ORDERED that any amounts collected thereunder shall be paid to the Plaintiff health care facility at which the violation occurred, or to the Registry of the Court if the targeted health care facility is not a Plaintiff, and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorney's fees and related costs incurred by plaintiffs in relation to the enforcement of this Order.

3. Violations of this Order shall be enforced by appropriate motion.

4. IT IS FURTHER ORDERED that the United States Marshal for the Western District of New York shall read this Order as set forth above in Paragraphs 1 and 2 in their entirety at the site of a demonstration or protest at a facility at which abortions are performed in the Western District of New York. Plaintiffs' counsel shall be responsible for notifying the Marshal in a timely manner of the location of such demonstration or protest activity.

5. It is the Court's intention that nothing contained in this Order shall supersede or diminish the obligation of local and state law enforcement authorities to fulfill their duties and responsibilities in enforcing state laws and local ordinances.

6. This Order shall remain in full force and effect until modified by further Order, or until final resolution by this Court of the claims for permanent injunctive relief in the above captioned matter.

APPENDIX F

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,

Intervenour Plaintiff,

v.

PROJECT RESCUE OF WESTERN NEW YORK, et al.

Defendants.

No. CIV-90-1004A

United States District Court
Western District of New York

ORDER TO SHOW CAUSE

Upon the Preliminary Injunction in the above case, granted by this Court and entered in the Clerk's Office of this Court on February 14, 1992, and upon all prior pleadings and proceedings had in the above case, and upon the annexed affidavits of:

GLENN E. MURRAY, ESQ., sworn to on November 13, 1995 (Exhibit A hereto),

LAWRENCE E. PAYNE, sworn to on October 20, 1995 (Exhibit B hereto);
MELINDA DUBOISE, sworn to on October 20, 1995 (Exhibit C hereto);
RICHARD C. WALKNER, sworn to on October 21, 1995 (Exhibit D hereto);
ANNA THIBOUDOU, sworn to on October 21, 1995 (Exhibit E hereto);
MARILYNN BUCKHAM, sworn to on October 23, 1995 (Exhibit F hereto),
and said Preliminary Injunction (Exhibit G annexed hereto); and upon counsel for plaintiffs, Glenn E. Murray, having appeared before this Court on November 28, 1995 and presented argument, and good cause having been shown, it is hereby:

ORDERED, that PHYLLIS WALKER and EVA BOLDT (hereinafter the "alleged contemnors") show cause before this Court why an order should not be entered pursuant to the Federal Rules of Civil Procedure and Rule 83.4 of the Local Rules of the Western District of New York granting plaintiff BUFFALO GYN WOMENSERVICES, INC. the following relief:

1. For their respective conduct at 2500 Main Street in the City of Buffalo of alleged contemnors:

- EVA BOLDT, on October 13, 1995, July 14, 1995, April 7, 1995 and March 3, 1995; and

- PHYLLIS WALKER, on October 13, 1995, April 7, 1995 and March 3, 1995; and

That each and all of the alleged contemnors be charged with and prosecuted for criminal contempt of and pursuant to said Preliminary Injunction and sentenced according to law; and

2. That for the aforesaid conduct, each and all of the alleged contemnors be adjudicated in civil contempt of Court and judgment be granted thereon, including but not limited to a civil contempt sanction of twenty thousand ($20,000.00) dollars each for WALKER and BOLDT, plus reasonable costs and counsel fees;

3. That the Court further fix bail for each and all of the alleged contemnors in the amount of ten thousand ($10,000.00) dollars cash, pending disposition of said criminal proceedings or prosecution;

4. That the Court prohibit each alleged contemnor from approaching within 100 feet of any facility at which abortions are preformed in the Western District of New York.

IT IS FURTHER ORDERED, that the alleged contemnors shall appear before this Court on December 19, 1995, at 9 o'clock in the forenoon of that day, at Part II, 6th Floor, of the United States Courthouse, 68 Court Street, Buffalo, New York, and that in the event of a failure to appear, the United States Marshal's Service shall effect or cause the arrest or the filing of detainers to secure the custody of each and all of the alleged contemnors and the alleged contemnors shall be brought before this Court immediately upon their arrest; and

IT IS FURTHER ORDERED, that personal delivery of this Order To Show Cause and the papers annexed hereto by a U.S. Marshal, deputy U.S. Marshal or by any person who is not a party and who is not less than 18 years of age shall constitute good and sufficient service upon the alleged contemnors served.

Dated: Buffalo, New York
November 28, 1995 /s/
Hon. Richard Arcara, U.S.D.J.

Time granted: 9:20 a.m.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,

Intervenour Plaintiff,

v.

PROJECT RESCUE OF WESTERN NEW YORK, et al.

Defendants.

No. CIV-90-1004A

United States District Court
Western District of New York

AFFIDAVIT OF GLENN EDWARD MURRAY, ESQ.

State of New York)
County of Erie) S.S.:
City of Buffalo)

GLENN EDWARD MURRAY, being first duly sworn, states:

1. I am an attorney for the plaintiffs. I submit this affidavit in support of the Order to Show Cause why PHYLLIS WALKER (hereinafter "Walker") and EVA BOLDT (hereinafter "Boldt"), who are named defendants, should not be held in

criminal contempt in violation of Title 18, United States Code, Sections 401(3) and 2, and in civil contempt, for knowing and willful disobedience of this Court's Preliminary Injunction, issued on February 14, 1992, by the Honorable Richard J. Arcara, United States District Court Judge, by doing acts forbidden in paragraphs 1(b), 1(c) and 1(a) and (e) of said order.

2. Alleged contemnors BOLDT and WALKER are regular demonstrators at plaintiff Buffalo GYN Womenservices, Inc. (hereinafter "Womenservices"), an abortion clinic within the Western District of New York.

3. On or about June 28, 1995 BOLDT and WALKER were convicted by a jury verdict of several counts of violating the Preliminary Injunction, for their conduct engaged in by them prior to the conduct described in the current Order to Show Cause. Despite these convictions, for which they are awaiting sentencing, BOLDT and WALKER have continued fagrantly [sic] violating the Preliminary Injunction on several subsequent occasions. Because of their repeated violations and the failure of the prior convictions to deter them, it is essential to place stringent pre-trial release conditions on them, including an order that requires that they not enter a one-hundred (100) foot distance from clinic entrances and doorways.

4. Their respective conduct upon which plaintiff Womenservices seeks relief herein is set forth in the affidavits of:

LAWRENCE E. PAYNE, MD (hereinafter "Payne", Exhibit B),
MELINDA DUBOIS (hereinafter "DuBois", Exhibit C),
RICHARD C. WALKNER (hereinafter "Walkner", Exhibit D),

ANNA M. THIBODEAU (hereinafter "Thibodeau", Exhibit E), and
MARILYNN BUCKHAM (hereinafter "Buckham", Exhibit F).

5. In support of the Order to Show Cause, the following facts and specifications are alleged:

ALLEGATIONS APPLICABLE TO ALL SPECIFICATIONS:

6. At all relevant times, Womenservices was a facility at which abortions and related services were performed, located at 2500 Main Street in Buffalo, New York. Womenservices had a doorway entrance and a driveway entrance, both facing Main Street.

7. At all times referred to herein, a civil lawsuit was pending in the Western District of New York under the title (abbreviated) of *Pro-Choice Network of New York, et al v. Project Rescue of Western New York* (the "civil case"), commenced on September 27, 1990 and presided over by the Honorable Richard Arcara, United States District Judge.

8. On or about February 14, 1992, Judge Arcara issued in the civil case a Preliminary Injunction, which, among other things, regulated certain conduct, including but not limited to demonstrating within fifteen feet of driveways and entrances of facilities that provided abortion and related services, and impeding access and egress to such facilities. The Preliminary Injunction only permitted sidewalk counseling within the fifteen feet if "consisting of a nonthreatening nature", and further, such counselors are required to immediately desist from such activity when the person wants not to be counsels [sic] or wants to leave or walk away. *See United States v. Walker*, 94-CR-32S,

Decision & Order, at page 13 (September 28, 1995, unpublished); *See also Pro-Choice Network of Western New York, et al v. Schenck & Saunders*, ___ F.3d ___ (2d Cir., September 28, 1995, Slip Op. at page 7887, n.6) (Injunction contains "cease and desist language" and "requirement that rebuffed 'counselors' retreat to a distance of fifteen from their failed targets.")

9. A copy of the Preliminary Injunction is attached to this affidavit as Exhibit G and is incorporated herein by reference.

10. At all times herein referred to, from and including the dates set forth below, painted yellow lines marked off a distance of approximately fifteen feet from either side of the front doorway and driveway entrances to Womenservices.

11. Set forth below are specifications by which Plaintiff Womenservices seeks charges against EVA BOLDT and PHYLISS WALKER, defendants in the civil case, for six (6) separate incidents occurring at Womenservices:

Incident #1:: Friday, October 13, 1995:: 11:55 a.m.

SPECIFICATION 1. AGAINST EVA BOLDT

On or about October 13, 1995 at about 11:55 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(a) of the Preliminary Injunction, that is, impeding egress from a driveway at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of PAYNE, Exhibit B herein).

SPECIFICATION 2. AGAINST EVA BOLDT

On or about October 13, 1995 at about 11:55 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

SPECIFICATION 3. AGAINST EVA BOLDT

On or about October 13, 1995 at about 11:55 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(c) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc. and did continue to "sidewalk counsel" a person who refused counseling and by failing to leave the 15 foot distance from the person sought to be counseled; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of PAYNE, Exhibit B herein).

Incident #2:: Friday, October 13, 1995:: 9:22 a.m.

SPECIFICATION 4. AGAINST EVA BOLDT

On or about October 13, 1995 at about 9:22 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelmininary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraphs 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

SPECIFICATION 5. AGAINST PHYLISS WALKER

On or about October 13, 1995 at about 9:22 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of WALKNER, Exhibit D herein).

Incident #3:: Friday, October 13, 1995:: 11:10 a.m.

SPECIFICATION 6. AGAINST EVA BOLDT

On or about October 13, 1995 at about 11:10 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District

Judge, by doing acts forbidden in paragraph 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

SPECIFICATION 7. AGAINST EVA BOLDT

On or about October 13, 1995 at about 11:10 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(c) of the Prelmininary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc. and did continue to "sidewalk counsel" a person who refused counseling and by failing to leave the 15 foot distance from the person sought to be counseled; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of WALKNER, Exhibit D herein & Affidavit of DUBOIS, Exhibit C herein).

SPECIFICATION 8. AGAINST PHYLISS WALKER

On or about October 13, 1995 at about 11:10 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelmininary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Prelmininary Injunction, that is, demonstrating within 14 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

SPECIFICATION 9, AGAINST PHYLISS WALKER

On or about October 13, 1995 at about 11:55 a.m., in the Western District of New York PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelmininary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(c) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc. and did continue to "sidewalk counsel" a person who refused counseling and by failing to leave the 15 foot distance from the person sought to be counseled; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of WALKNER, Exhibit D herein and Affidavit of DUBOIS, Exhibit C herein).

Incidient #4:: Friday, July 14, 1995:: 10:30 a.m.

SPECIFICATION 10, AGAINST EVA BOLDT

On or about July 14, 1995 at about 10:30 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelimi[illegible]nary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraphs 1(b) of the Prelmininary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

SPECIFICATION 11, AGAINST EVA BOLDT

On or about July 14, 1995 at about 10:30 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(c) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc. and did continue to "sidewalk counsel" a person who refused counseling and by failing to leave the 15 foot distance from the person sought to be counseled; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of THIBODEAU, Exhibit E herein).

SPECIFICATION 15, AGAINST PHYLISS WALKER

On or about April 7, 1995 at about 11:00 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelmininary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Prelmininary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States code, Section 401(3).

(See Affidavit of BUCKHAM, Exhibit F herein).

Incident #6:: Friday, March 3, 1995:: 10:00 a.m.

SPECIFICATION 16. AGAINST EVA BOLDT

On or about March 3, 1995, at about 10:00 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraphs 1(b) of the Prelmininary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of BUCKHAM, Exhibit F herein).

SPECIFICATION 17. AGAINST PHYLISS WALKER

On or about March 3, 1995, at about 10:00 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the Untied States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraphs 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of BUCKHAM, Exhibit F herein).

WHEREFORE, deponent prays for the relief requested in the Order to Show Cause, annexed hereto.

/s/
Glenn Edward Murray

Sworn to before me this 13th day of November, 1995.

/s/
NOTARY PUBLIC

JULIE A. GRACZ
Notary Public, State of New York
Qualified in Erie County
Commission Expires May, 9, 1996

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,

Intervenour Plaintiff,

v.

PROJECT RESCUE OF WESTERN NEW YORK, et al.

Defendants.

No. CIV-90-1004A

United States District Court
Western District of New York

Defendants.

AFFIDAVIT OF LAWRENCE E. PAYNE, M.D.
(Incident of Friday, October 13, 1995, 10:50 a.m.,
at 2500 Main Street)

State of New York)
County of Erie) S.S.:
City of Buffalo)

LAWRENCE E. PAYNE, M.D., being first duly sworn, states:

1. I am an adult resident of Amherst, New York, and a physician providing services to patients of Buffalo Gyn Womenservices, Inc. ("Womenservices"), an abortion clinic, located at 2500 Main Street, Buffalo, New York.

2. On Friday, October 13, 1995, at approximately 10:50 a.m., while within Womenservices, after I had provided services to patients, I was contacted by telephone at Womenservices and I was informed that a Patient of mine there needed medical services, a cesarean delivery on an emergency basis, at Buffalo General Hospital, also located within the City of Buffalo.

3. I promptly walked out the rear entrance door to the parking lot that adjoins Womenservices, where I got in my car and drove to Main Street, using the only driveway that leads from the parking lot to Main Street. At the intersection of the driveway and Main Street I had to stop my car in the driveway because of vehicular traffic I saw traveling downtown, from my left to my right.

Incident #5:: Friday, April 7:: 11:00 a.m.

SPECIFICATION 12, AGAINST EVA BOLDT

On or about April 7, 1995 at about 11:00 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(a) of the Preliminary Injunction, that is, impeding access to a driveway at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of BUCKHAM, Exhibit F herein).

SPECIFICATION 13, AGAINST EVA BOLDT

On or about April 7, 1995 at about 11:00 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, Untied States Code, Section 401(3).

(See Affidavit of BUCKHAM, Exhibit F herein).

SPECIFICATION 14, AGAINST PHYLISS WALKER

On or about April 7, 1995 at about 11:00 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(a) of the Preliminary Injunction, that is, impeding access to a driveway at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of BUCKHAM, Exhibit F herein).

4. Then, a regular anti-abortion demonstrator, known to me as Eva Boldt, rushed up to the driver side window of my car and held a large sign approximately one foot in front and across of my driver side window. The sign had a color picture of a purported fetus and this sign was approximately

three feet by two feet in size. With this sign, Boldt blocked my view of any oncoming traffic or pedestrians and prevented me from safely exiting the driveway.

5. I inched my car forward a couple of feet forward and Boldt followed me forward, moving the sign so that my view continued to be blocked. I then put my car in reverse and moved it back a couple of feet and she stepped to follow my movement back, again blocking my view with her sign that she continued to hold in front of my side view window.

6. I was concerned about being delayed in responding to my patient's emergency and I was concerned about the danger of an accident with vehicles or pedestrians. I did not feel that it was possible to safely exit the driveway because of Boldt's conduct.

7. I opened my driver side window to tell Boldt to stop what she was doing and she shouted at me "Stop killing babies", or words to that effect. I opened my driver side door, stepped out and told Boldt "Get away-someone's going to get killed", or words to that effect. Boldt shouted at me "What's the difference-you've been killing all day!", or words to that effect. I got back in my car, and because I could then safely turn onto Main Street I proceeded to Buffalo General Hospital, where I learned that other staff had performed the emergency procedure on my patient because of the delay in my arriving at the Hospital.

8. At all times throughout the incident, Boldt was standing within fifteen (15) feet of the driveway entrance and there were no patients within fifteen (15) feet from the driveway entrance and within the yellow lines painted on the pavement that shows the buffer zone established by the court's preliminary injunction.

9. On numerous occasions before this incident, Eva Boldt had shouted at me as I entered or exited Womenservices and she had referred to me as "Doctor Payne" on many of these occasions, when she shouted at me "Stop murdering babies", or words to that effect.

/s/
Lawrence E. Payne, M.D.

Sworn to before me on the 20th day of October 1995.

/s/
NOTARY PUBLIC

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 30, 1996

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,

Intervenour Plaintiff,

v.

PROJECT RESCUE OF WESTERN NEW YORK, et al.

Defendants.

No. CIV-90-1004A

United States District Court
Western District of New York

AFFIDAVIT OF MELINDA DUBOIS

State of New York)
County of Erie) S.S.:
City of Buffalo)

MELINDA DUBOIS, being first duly sworn, states:

1. I am an adult resident of Lancaster, New York. I am, and was at all times mentioned herein employed in my capacity as a counseling supervisor at Buffalo Gyn

Womenservices, Inc. ("Womenservices"), an abortion clinic located at 2500 Main Street, Buffalo, New York.

(Incident of Friday, October 13, 1995, 11:10 a.m., 2500 Main Street)

2. On Friday, October 13, 1995, at approximately 11:10 a.m., I had walked out the clinic front door and expressed concern for a patient to Mr. Walkner, a security guard at Womenservices. I was trying to locate a patient who I had been told was distraught. Mr. Walkner and I were standing within the doorway alcove. As I began to speak with Mr. Walkner, I was interrupted by two women, one of whom was much older than the other. Mr. Walkner has identified the older woman as Eva Boldt and the younger woman as Phyliss Walker.

3. Boldt and Walker shouted slogans at me, such as "They're murdering babies in there", or words to that effect. Ms. Walker then stared at my name tag that was pinned to my chest and, as if reading it, recited in a loud voice "Melinda DuBois, Counseling Supervisor". They then both shouted at me, "Aren't you ashamed?" and asked me "How many babies are you going to kill today?", or words to that effect.

4. The loud, abusive and disruptive manner with which Boldt and Walker shouted at me made it difficult to communicate with Mr. Walkner, and this disrupted and delayed the performance of my duties at Womenservices.

5. When Boldt and Walker were shouting at me, they were standing within fifteen (15) feet of the doorway entrance of Womenservices, within approximately ten feet of me and there were no patients within fifteen (15) feet from the door.

6. At no time did I indicate any willingness to communicate with Boldt or Walker.

/s/ _____
Melinda Dubois

Sworn to before me this 20th day of October, 1995.

/s/ _____
NOTARY PUBLIC

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April, 30 1996

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,

Intervenour Plaintiff,

v.

PROJECT RESCUE OF WESTERN NEW YORK, et al.

Defendants.

No. CIV-90-1004A

United States District Court
Western District of New York

Defendants.

AFFIDAVIT OF RICHARD C. WALKNER

State of New York)
County of Erie) S.S.:
City of Buffalo)

RICHARD C. WALKNER, being first duly sworn, states:

1. I am an adult resident of Buffalo, New York, and at various times during the past two years I have been assigned security guard duties at 2500 Main Street, Buffalo, New York, in my capacity as an employee of Morris Protective Services, Inc. Located at this address is Buffalo Gyn Womenservices, Inc. ("Womenservices"), an abortion clinic. There, I have observed Phyllis Walker and Eva Boldt on numerous occasions scream and yell at Womenservices' patients and employees and tried to force literature and photographs upon Womenservices' patients or employees who were trying to enter or leave the clinic.

(Friday, October 13, 1995 at 11:10 A.M., 2500 Main Street)

2. On Friday, October 13, 1995, at approximately 9:22 a.m., I observed the following conduct by Boldt and Walker at or near the front doorway entrance to the clinic on Main Street.

3. I observed Boldt and Walker following a young woman and a young male as they walked toward the front doorway entrance of Womenservices. Boldt and Walker started shouting at the couple and the young male shouted back at Boldt and Walker, "Get the Fuck out of my face and leave us alone - we don't want to hear your bullshit" or words to that effect. Boldt and Walker continued to walk immediately behind the couple, following them into the fifteen (15) foot distance from the front doorway entrance. Within the fifteen (15) foot distance, Boldt and Walker were both shouting slogans at the couple such as, Where will you spend eternity?", Don't kill your baby" and Abortion is murder", or words to that effect.

4. At no time did either the young male or the young female indicate any willingness to engage in conversation with Boldt or Walker.

(Friday, October 13, 1995 at 11:10 A.M., 2500 Main Street)

5. On Friday, October 13, 1995, at approximately 11:10 a.m., I observed the following conduct by Boldt and Walker at or near the front doorway entrance to the clinic on Main Street. An employee of Womenservices, Melinda DuBois, had walked out the clinic front doorway exit moments before and spoken to me to express concern for a patient. As I began to speak with Ms. DuBois, we were interrupted by Eva Boldt and Phyllis Walker, who both shouted at Ms. DuBois. Boldt and Walker were shouting slogans, such as "They're murdering babies in there", or words to that effect. Ms. Walker then stared at Ms. DuBois's name tag and, as if reading it, stated in a loud voice "Melinda DuBois, Counseling Supervisor", "Aren't you ashamed?" and "How many babies are you going to kill today?", or words to that effect.

6. When Boldt and Walker were shouting at Ms. DuBois, they were standing within 15 feet of the door, within approximately ten feet of Ms. DuBois, and there were no patients within fifteen (15) feet from the door.

7. At no time did Ms. DuBois indicate any willingness to communicate with Boldt or Walker.

/s/
Richard C. Walkner

Sworn to before me on the 21st day of October, 1995.

/s/
NOTARY PUBLIC

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 30, 1996.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,

Intervenour Plaintiff,

v.

PROJECT RESCUE OF WESTERN NEW YORK, et al.

Defendants.

No. CIV-90-1004A

United States District Court
Western District of New York

AFFIDAVIT OF ANNA THIBODEAU

State of New York)
County of Erie) S.S.:
City of Buffalo)

ANNA M. THIBODEAU, being duly sworn, deposes and says:

1. On July 14, 1995, I was employed at Buffalo GYN Womenservices, Inc., an abortion clinic at Buffalo, New York (hereinafter the "clinic"). At approximately 11:30 a.m.,

I was leaving the clinic and had walked out the clinic front door, adjacent to Main Street. Mrs. Eva Boldt came up to me and in a loud voice she asked "How many babies are being murdered in there today?" I continued walking away from the clinic and as Mrs. Boldt followed me I said in a clear and audible voice, "Please leave me alone!"

2. Mrs. Boldt continued to follow me, asking, "How many babies are being murdered..." Before she finished speaking, I again said to her in a clear and audible voice, "Please leave me alone."

3. Mrs. Boldt started to say something to me again and I said to Mrs. Boldt, "That's two times, and I will charge you with harassment if you keep bothering me after I tell you I want to be left alone."

4. Mrs. Boldt then said at least twice to me, "You'll never see heaven". I then crossed Main Street to my car and left the vicinity of the clinic.

/s/
Anna M. Thibodeau

Sworn to before me on the 21st day of October, 1995.

/s/
Notary Public

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 30, 1996.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,

Intervenour Plaintiff,

v.

PROJECT RESCUE OF WESTERN NEW YORK, et al.

Defendants.

No. CIV-90-1004A

United States District Court
Western District of New York

AFFIDAVIT OF MARILYNN BUCKHAM
(Incidents of Friday, April 7, 1995 at 11:00 a.m. and
Friday, March 3, 1995 at 10:00 a.m., 2500 Main Street)

State of New York)
County of Erie) S.S.:
City of Buffalo)

MARILYN BUCKHAM, being first duly sworn, states:

1. I am the executive director of Buffalo GYN Womenservices, and have held this position since 1983. As executive director, I am the Chief Administrative Officer of Buffalo GYN Womenservices, Inc. ("Womenservices") and am in charge of hiring and training its employees.

2. Eva Boldt and Phyllis Walker are anti-abortion demonstrators who regularly harass me and the staff, patients and physicians of Womenservices.

3. The filing of previous contempt charges against both of them, bail conditions imposed on them and their conviction of violating this court's preliminary injunction has not diminished their conduct that violates the preliminary injunction.

4. One example of such conduct occurred on Friday, April 7, 1995, at approximately 11:00 a.m. I attempted to enter the driveway of 2500 Main Street while driving in my car north down Main Street. As I began making the left turn from Main Street towards the driveway of 2500 Main Street, Phyllis Walker was standing in the apron area of the driveway, thereby causing me to stop with the right flank of my car exposed to oncoming traffic in the opposite lane. I slowly inched the car towards the driveway as Phyllis Walker remained standing there, all the while shouting in an extremely loud voice even though no patients were in the driveway or attempting to enter the building.

5. Phyllis Walker's continued presence in the driveway caused me to remain in my car, with at least a portion of the car exposed to oncoming traffic in the southbound lanes of Main Street. As my car inched up the driveway, Eva Boldt stood at the passenger side of my car and screamed into the front seat. Ms. Boldt's presence there, touching my car, prevented me from driving at an ordinary rate of speed because had I done

so I would have injured her. After about 30 seconds, Phyllis Walker stepped aside, thereby allowing me to continue up the driveway.

6. Phyllis Walker, however, continued to shout and scream in the direction of the parking lot at the end of the driveway, even though no patients were in the area. As she did this she was standing in the driveway within the 15-foot lines.

7. After I got out of my car, I entered the building and walked through the building and around to the front entrance. I stood in the vestibule area of the front door and could see Eva Boldt and Phyllis Walker still standing in the driveway and shouting.

8. On Friday, March 3, 1995, at approximately 10:00 a.m., two young girls entered the clinic through the front entrance. Shortly after they entered, I went into the vestibule area and saw Eva Boldt and Phyllis Walker leaning into the vestibule area from the outside shouting for more than one minute. By this time, the two young girls were well within the building and not any longer within sight of persons standing

outside. During the course of their shouting, I advised Ms. Boldt and Ms. Walker that they were violating the injunction, and I asked them to step back. The did not do so.

/s/
Marilynn Buckham

Sworn to before me on the 23rd day of October, 1995.

/s/
NOTARY PUBLIC

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 30, 1996.